lief. *See Mack-Manley*, 122 Nev. at 856, 138 P.3d at 530 (indicating that, even if the district court certifies that it intends to grant relief, the decision as to whether a motion for remand will be granted remains within this court's discretion); *cf. Hancock Industries v. Schaeffer*, 811 F.2d 225, 239 (3d Cir. 1987) (rejecting a motion for remand made after the time for seeking relief under Fed. R. Civ. P. 60(b) had expired).

PARRAGUIRRE, C.J., and DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

RONALD FOSTER; PATRICK COCHRANE; AND FREDERICK DORNAN, APPELLANTS, *v.* TERRY DINGWALL, AN INDIVIDUAL, AND DERIVATIVELY ON BEHALF OF INNOVATIVE ENERGY SOLUTIONS, INC.; MICHAEL HARMAN, SPECIAL MASTER, HYUN IK YANG; AND HYUNSUK CHAI, RESPONDENTS.

No. 50166

February 25, 2010 227 P.3d 1042

Appeal from a district court judgment in a contracts action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Corporation brought breach of fiduciary duties, usurpation of corporate opportunities, conversion, and conspiracy action against director. Director counterclaimed, on behalf of the corporation, against the other directors. Shareholders intervened, asserting misrepresentation claims against the majority directors. The district court granted director's second motion seeking sanctions against the majority directors for discovery abuse, struck majority directors' pleadings, and awarded director and shareholders compensatory damages. Majority directors appealed. The supreme court, HARDESTY, J., held that: (1) district court did not abuse its discretion by striking majority directors' pleadings as a discovery sanction, (2) evidence was sufficient to establish at prove-up hearing a prima facie case that director was entitled to $2,890,000 in compensatory damages on the derivative claims he asserted against majority directors, (3) shareholders did not establish at prove-up hearing a prima facie case that they were entitled to compensatory damages, (4) district court did not abuse its discretion by awarding director and shareholders attorney fees, and (5) district court did not abuse its discretion by ordering majority directors to pay special-master fees.

Affirmed in part and reversed in part.

CHERRY, J., with whom SAITTA and PICKERING, JJ., agreed, dissented in part.

Bailus Cook & Kelesis, Ltd., and *Marc P. Cook*, Las Vegas, for Appellants Ronald Foster and Patrick Cochrane.

Holland & Hart LLP and *J. Stephen Peek, Matthew J. Kreutzer*, and *Janet L. Rosales*, Las Vegas, for Appellant Frederick Dornan.

Buchalter Nemer and *Michael L. Wachtell*, Los Angeles, California, for Respondent Michael Harman.

Howard & Howard, PC, and *James A. Kohl*, Las Vegas, for Respondents Hyun Ik Yang and Hyunsuk Chai.

Lewis & Roca LLP and *Daniel F. Polsenberg* and *Dan R. Waite*, Las Vegas, for Respondent Terry Dingwall.

1. APPEAL AND ERROR.
   Supreme court generally reviews a district court's imposition of a discovery sanction for abuse of discretion.
2. APPEAL AND ERROR.
   A heightened standard of review applies when a district court discovery sanction strikes the pleadings, resulting in dismissal with prejudice, and under this somewhat heightened standard, the district court abuses its discretion if the sanctions are not just and do not relate to the claims at issue in the discovery order that was violated. NRCP 37(b)(2)(C).
3. PRETRIAL PROCEDURE.
   District court did not abuse its discretion by striking majority directors' pleadings and entering default judgment against majority directors, in breach of fiduciary duty action brought by majority directors against fourth director in which fourth director and shareholders asserted derivative claims against majority directors, as a sanction for majority directors engaging in abusive litigation practices and failing to comply with discovery orders; majority directors failed to comply with district court's first sanction order, did not attend their own depositions or refused to answer questions, engaged in repeated and continuing abuses, and did not oppose director's and shareholders' second motion to strike pleadings. NRCP 37(b)(2)(C), (d).
4. DAMAGES.
   When default is entered by a district court, the court, if necessary, may conduct a prove-up hearing to determine the amount of damages. NRCP 55(b)(2).
5. DAMAGES.
   Generally, when an entry of default judgment is for an uncertain or incalculable sum, the plaintiff must prove up damages, supported by substantial evidence. NRCP 55(b)(2).
6. PRETRIAL PROCEDURE.
   When default is entered as a result of a discovery sanction, the nonoffending party need only establish a prima facie case in order to obtain the default judgment. NRCP 55(b)(2).
7. JUDGMENT.
   Generally, where a district court enters default, the facts alleged in the pleadings will be deemed admitted.

8. PRETRIAL PROCEDURE.
   During prove-up hearing following the entry of a default judgment as a discovery sanction, the district court shall consider the allegations in the nonoffending party's pleadings deemed admitted to determine whether the nonoffending party has established a prima facie case for liability. NRCP 55(b)(2).
9. PRETRIAL PROCEDURE.
   A prima facie case, for purposes of a prove-up hearing following the entry of default as a discovery sanction, is supported by sufficient evidence when enough evidence is produced to permit a trier of fact to infer the fact at issue and rule in the party's favor. NRCP 55(b)(2).
10. DAMAGES.
    When a district court determines that a prove-up hearing is necessary to determine the amount of damages following the entry of default as a discovery sanction, the district court has broad discretion to determine how the prove-up hearing should be conducted and the extent to which the offending party may participate. NRCP 55(b)(2).
11. PRETRIAL PROCEDURE.
    At a prove-up hearing following the entry of default as a discovery sanction, the district court has the discretion to limit the defaulting party's presentation of evidence where the court has determined that the nonoffending party has presented sufficient evidence to establish the essential elements of the prima facie case for which it seeks relief. NRCP 55(b)(2).
12. DAMAGES.
    When the defaulting party, following the entry of a default as a discovery sanction, identifies a fundamental defect in the nonoffending party's case, it would be an abuse of discretion for the district court at the prove-up hearing to preclude the defaulting party from presenting evidence to challenge the claim, especially when the nonoffending party seeks monetary damages without demonstrating entitlement to the relief sought or that the damage award is reasonable and accords with the principles of due process. U.S. CONST. amend. 14; NRCP 55(b)(2).
13. PRETRIAL PROCEDURE.
    Although allegations in the pleadings are deemed admitted as a result of the entry of default as a discovery sanction, the admission does not relieve the nonoffending party's obligation to present sufficient evidence to establish a prima facie case, which includes substantial evidence that the damages sought are consistent with the claims for which the nonoffending party seeks compensation. NRCP 55(b)(2).
14. DAMAGES.
    When the nonoffending party seeks monetary relief at a prove-up hearing following the entry of a default as a discovery sanction, a prima facie case requires the nonoffending party to establish that the offending party's conduct resulted in damages, the amount of which is proven by substantial evidence. NRCP 55(b)(2).
15. PRETRIAL PROCEDURE.
    Following the entry of a default as a discovery sanction, a nonoffending party is not entitled to unlimited or unjustifiable damages simply because default was entered against the offending party. NRCP 55(b)(2).
16. DAMAGES.
    Evidence was sufficient to establish, at prove-up hearing following entry of default against corporation's majority directors as a discovery sanction, a prima facie case that director, who had asserted derivative breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duties, constructive fraud, intentional mis-

representation, conversion, and indemnity claims against majority directors, was entitled to compensatory damages in the amount of $2,890,000; allegations in director's complaint against majority directors sufficiently established the elements necessary to prove each claim, director presented charts and other demonstrative evidence, prepared with the assistance of a certified public accountant after they reviewed 50,000 pages of documents, to prove the amount of damages for each particular cause of action, and district court allowed majority directors to cross-examine director and provided majority directors an opportunity to cross-examine accountant. NRCP 55(b)(2).

17. PRETRIAL PROCEDURE.

Where default is entered as a discovery sanction, the nonoffending party is not required to prove likelihood of success on the merits; rather, it is only required to prove a prima facie case to support its claims.

18. DAMAGES.

Shareholders, who alleged that majority directors had wrongfully induced them into transferring their stock through either intentional or negligent misrepresentations, did not establish a prima facie case for compensatory damages, at prove-up hearing following entry of default against majority directors as a discovery sanction; shareholders principally sought the reinstatement of their stock and the cancellation of majority directors' stock, shareholders were granted such relief and an award of compensatory damages was duplicative, and though shareholders' pleadings were deemed admitted they still had the responsibility to show that the amount of damages sought corresponded with the asserted causes of action, and it was not sufficient for shareholders merely to assert the fact that they were damaged. NRCP 55(b)(2).

19. FRAUD.

Both intentional misrepresentation and negligent misrepresentation claims require a showing that claimed damages resulted from the tortious misrepresentations.

20. APPEAL AND ERROR.

The supreme court reviews a district court's grant of attorney fees for abuse of discretion.

21. PRETRIAL PROCEDURE.

District court did not abuse its discretion by awarding shareholders and director attorney fees after it entered default judgment against majority directors as a discovery sanction, in breach of fiduciary duty action brought by majority directors against fourth director in which fourth director and shareholders asserted derivative claims against majority directors; majority directors refused to comply with district court's discovery order, majority directors did not appear at their deposition or refused to answer questions, and majority directors' claims and defenses were frivolous and not based in law or fact. NRS 18.010(2)(a), (b); NRCP 37(b)(2).

22. APPEAL AND ERROR; REFERENCE.

Because the appointment of a special master is within the district court's discretion, and because a special master is entitled to a reasonable remuneration for his or her services, the supreme court will review the district court's award of special-master fees for abuse of discretion.

23. PRETRIAL PROCEDURE.

District court did not abuse its discretion by ordering majority directors to pay special-master fees after it entered default judgment against majority directors as a discovery sanction, in breach of fiduciary duty action brought by majority directors against fourth director in which fourth

director and shareholders asserted derivative claims against majority directors; though at hearing on the appointment of a special master the parties agreed to split special-master fees 50/50, district court communicated that the fees would be recoverable at the end of the case by the prevailing party, and by entering default against majority directors district court determined that director and shareholders were the prevailing parties.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

In this opinion, we address two main issues. First, we consider whether an order to strike appellants' pleadings was a proper discovery sanction in this case. Second, we address the burden of proof that a party must satisfy at an NRCP 55(b) prove-up hearing to establish damages, following the entry of default.

Because we conclude that appellants' conduct during discovery was repetitive, abusive, and recalcitrant, we uphold the district court's decision to strike the pleadings and enter default. We clarify that after an entry of default, at an NRCP 55(b)(2) prove-up hearing, the nonoffending party retains the burden of presenting sufficient evidence to establish a prima facie case for each cause of action as well as demonstrating by substantial evidence that damages are attributable to each claim. Accordingly, we uphold the award of compensatory damages to respondent Terry Dingwall because Dingwall presented a prima facie case for damages on each cause of action, which included substantially demonstrating that he was entitled to the relief sought. However, we reverse the compensatory damage award to respondents Hyun Ik Yang and Hyunsuk Chai because it was duplicative and because no evidence was presented to show the relationship between the tortious conduct and the requested award.

FACTS AND PROCEDURAL HISTORY

The underlying suit arose in August 2005 when Innovative Energy Solutions, Inc. (IESI), a full-service energy corporation, filed a suit against, among others, Dingwall, a director of IESI. In its complaint, IESI alleged that Dingwall breached his corporate fiduciary duties, usurped corporate opportunities, and engaged in civil conspiracy and conversion. On behalf of IESI, Dingwall filed an amended answer and third-party complaint, where he asserted claims[1] against appellants Frederick Dornan, Ronald Foster, and

[1]Specifically, Dingwall alleged claims for breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duties, conspiracy, intentional and negligent misrepresentation, abuse of process, intentional in-

Patrick Cochrane, other directors of IESI, in their individual capacities. After Dingwall filed his third-party complaint, IESI shareholders Yang and Chai moved to intervene in the action. The district court granted the motion to intervene, and Yang and Chai asserted derivative claims on behalf of IESI and individual claims against Dornan, Foster, and Cochrane. Subsequently, Yang and Chai moved the district court for an appointment of a receiver alleging that IESI was mismanaging the corporate assets; however, the parties later agreed that a special master should be appointed to examine the records of IESI.

During discovery in November 2006, the parties agreed that depositions of Dornan, Foster, and Cochrane would occur on specified dates in January 2007. Dingwall's counsel agreed to fly to Canada to depose Dornan and Cochrane in their hometown and to depose Foster in Las Vegas, Nevada.

In December 2006, counsel for Dornan, Foster, and Cochrane moved the court to withdraw due to unpaid legal fees. While awaiting the court's decision on the motion, counsel for Dornan, Foster, and Cochrane notified Dingwall that the depositions could not proceed as scheduled because IESI's counsel was also withdrawing and IESI needed to retain new corporate counsel. In response, Dingwall expressed his intent to proceed with the depositions, maintaining that withdrawal of IESI's counsel had no affect on the depositions, and travel had already been arranged and expenses incurred.

After counsel for Dornan and Cochrane again informed Dingwall that neither Dornan nor Cochrane would be available for their depositions in Canada, Dingwall stated that he would proceed with the depositions unless the court issued a protective order. Dingwall also warned Dornan's and Cochrane's counsel that if they failed to attend without obtaining a protective order, he would seek severe sanctions, including striking all pleadings and an entry of default. A protective order was not obtained, and neither Dornan nor Cochrane appeared for his deposition.

Similarly, Foster also stated that he would not attend his deposition, citing his inability to afford legal counsel to represent him. Additionally, Foster notified Dingwall that IESI had filed for bankruptcy. In response, Dingwall maintained that Foster's inability to afford legal representation did not excuse him from attending his scheduled deposition, and absent a protective order, the deposition would continue as scheduled. Dingwall further informed Foster that if Foster failed to attend, he would seek sanctions, including a request to strike all pleadings. Foster replied, stating that he

---

terference with contractual relations and prospective economic advantage, unjust enrichment, receivership, indemnity, contribution, accounting, and conversion.

would nevertheless not attend his deposition because of health concerns. Foster did not appear for his deposition and no protective order was entered. During this time, Dornan, Foster, and Cochrane had also failed to provide complete responses to Dingwall's interrogatories and failed to produce requested documents.

The court ultimately granted Dornan, Foster, and Cochrane's counsel's motion to withdraw. Dornan, Foster, and Cochrane's counsel drafted the formal order granting the withdrawal motion, which the court signed on January 12, 2007. In the order, counsel listed a Henderson, Nevada, address where Dornan, Foster, and Cochrane could receive further notice. Also included in the withdrawal order was the following statement: ''IT IS FURTHER ORDERED ADJUDGED AND DECREED, that the deposition of Counterdefendant/Third Party defendant, Ronald Foster is currently scheduled for January 18, 2007. (*Stay pursuant to Bankruptcy filing*).''[2] (Emphasis added.)

Thereafter, due to Dornan's, Foster's, and Cochrane's failures to appear for their noticed depositions and other alleged discovery violations, Dingwall filed his first motion seeking to strike the pleadings and enter default. Shareholders Yang and Chai joined. Neither Dornan, Foster, nor Cochrane opposed Dingwall's motion for sanctions. Thus, pursuant to Eighth Judicial District Court Rule (EDCR) 2.20(b), as it existed in 2007,[3] the court deemed all allegations in Dingwall's motion admitted.

On March 1, 2007, the court entered an order issuing lesser sanctions against Dornan, Foster, and Cochrane and did not strike the pleadings at that time. The court clarified any confusion as to the January 12, 2007, withdrawal order, by deleting the ''Stay pursuant to Bankruptcy filing'' language because the stay did not apply to Dornan, Foster, and Cochrane. The court also compelled Dornan, Foster, and Cochrane to supplement their previously deficient responses to interrogatories and requests for production of documents within 10 days. In addition, the court ordered Dornan, Foster, and Cochrane to attend depositions within 30 days. The court expressly warned Dornan, Foster, and Cochrane about their discovery tactics, finding, in part, that they had been acting in bad faith. The court warned that Dornan's, Foster's, and Cochrane's failures to comply with the court's order would result in further sanctions, including an order to strike their pleadings and entry of judgment against them, including an award of fees and costs. Dingwall faxed and mailed multiple copies of the order to Dornan,

---

[2]IESI had filed for Chapter 7 bankruptcy on January 9, 2007. However, neither Dornan, Foster, nor Cochrane had personally filed for bankruptcy at any time during pendency of the underlying suit.

[3]EDCR 2.20 was amended, effective April 23, 2008, and the language of former EDCR 2.20(b) is now found in EDCR 2.20(c).

Foster, and Cochrane at both the designated Henderson address and at IESI's address in Canada.

Dornan, Foster, and Cochrane failed to comply with the court's order. Dornan and Cochrane failed to attend their court-mandated depositions, despite the court's clarification that IESI's bankruptcy stay did not affect Dornan's, Foster's, and Cochrane's discovery obligations. And although Foster attended his deposition, the court determined that Foster refused to answer many relevant questions. In addition, Dornan, Foster, and Cochrane did not supplement their responses to interrogatories or requests for production of documents.

As a result, Dingwall filed a second motion seeking sanctions, again requesting that the court strike the pleadings against Dingwall and enter default against Dornan, Foster, and Cochrane. Neither Dornan, Foster, nor Cochrane opposed Dingwall's motion. Consequently, the court held an evidentiary hearing on the factors set forth in *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990), to determine whether the sanction was proper. Following the evidentiary hearing, the court granted Dingwall's second sanction motion and struck Dornan's, Foster's, and Cochrane's pleadings and entered default against them. The court also announced that it would hold an NRCP 55(b)(2) prove-up hearing to determine the amount of damages.

At the subsequent prove-up hearing, the court first heard from Dingwall, who testified that he had worked with a certified public accountant to calculate an estimate of damages. He also presented demonstrative evidence to show how his asserted causes of action related to the damages sought. Second, the court heard from Yang, who testified that his derivative claims were based on the testimony and evidence presented by Dingwall.

Thereafter, the court entered a judgment detailing its findings of fact, conclusions of law, and award of damages. The court ultimately awarded Dingwall, derivatively on behalf of IESI, compensatory damages totaling approximately $2,890,000, and punitive damages for approximately $8,673,000. In response to Yang and Chai's request to reinstate their IESI stock, the district court declared that Yang and Chai were entitled to their vested shares. The court also awarded Yang and Chai compensatory damages totaling $15,000,000, and punitive damages totaling $45,000,000. The court further awarded Dingwall, Yang, and Chai attorney fees and compelled Dornan, Foster, and Cochrane to pay all special-master fees. Dornan, Foster, and Cochrane appeal.[4]

---

[4]Although the district court awarded punitive damages to Dingwall, Yang, and Chai, all three parties withdrew their claims for punitive damages during oral argument. Therefore, we do not address the propriety of the punitive damages award.

DISCUSSION

First, we consider whether the district court erred by striking Dornan's, Foster's, and Cochrane's pleadings and entering default against them. Because the district court's detailed strike order sufficiently demonstrated that Dornan's, Foster's, and Cochrane's conduct was repetitive, abusive, and recalcitrant, we conclude that the district court did not err by striking their pleadings and entering default judgment against them.

Second, we consider whether the district court erred by awarding damages against Dornan, Foster, and Cochrane. We take this opportunity to clarify that even where there is an entry of default, the presentation of a prima facie case requires the nonoffending party to present sufficient evidence to show that the amount of damages sought is attributable to the tortious conduct and designed to either compensate the nonoffending party or punish the offending party. Because Dingwall presented evidence to show that the damages sought were related to each cause of action, and that the compensatory damages award was based on reasonably calculated estimates, we uphold the damages awarded to Dingwall. However, we reverse the compensatory damages awarded to Yang and Chai because the award was duplicative and not based on any credible evidence or calculated estimate.

Third, we consider whether the district court abused its discretion by awarding attorney fees to Dingwall, Yang, and Chai. Because the district court found the claims and defenses of Dornan, Foster, and Cochrane were frivolous and asserted in bad faith, we conclude that the district court did not abuse its discretion by awarding attorney fees.

Lastly, we consider whether the district court abused its discretion by ordering Dornan, Foster, and Cochrane jointly and severally liable for the special-master fees. Because the parties failed to object to the district court's clear communication that the special-master fees would be recoverable by the prevailing party, we conclude that the district court did not abuse its discretion by ordering Dornan, Foster, and Cochrane to pay the fees.

The strike order and entry of default

Dornan, Foster, and Cochrane challenge the district court's order striking their pleadings. They primarily claim that the court erred by failing to make the findings required in *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 787 P.2d 777 (1990), before imposing the strike sanction.[5]

[5]Separately, Dornan asserts that the district court erred by grouping him with Foster and Cochrane for sanction purposes, arguing that the district court failed to consider the distinctions between Dornan and his colleagues. We

[Headnotes 1, 2]

NRCP 37(b)(2)(C) grants the district court authority to strike the pleadings in the event that a party fails to obey a discovery order. This court generally reviews a district court's imposition of a discovery sanction for abuse of discretion. *Young*, 106 Nev. at 92, 787 P.2d at 779. However, a somewhat heightened standard of review applies where the sanction strikes the pleadings, resulting in dismissal with prejudice. *Id*. Under this somewhat heightened standard, the district court abuses its discretion if the sanctions are not just and do not relate to the claims at issue in the discovery order that was violated. *Id*. at 92, 787 P.2d at 779-80.

NRCP 37(d) specifically provides that the court may strike a party's pleadings if that party fails to attend his own deposition.[6] In addition, this court has upheld entries of default where litigants are unresponsive and engage in abusive litigation practices that cause interminable delays. *Young*, 106 Nev. at 94, 787 P.2d at 780; *Temora Trading Co. v. Perry*, 98 Nev. 229, 230-31, 645 P.2d 436, 437 (1982) (upholding default judgment where corporate officers failed to show up for court-ordered depositions).

[Headnote 3]

In *Young*, we emphasized that ''every order of dismissal with prejudice as a discovery sanction [must] be supported by an express, careful and preferably written explanation of the court's analysis of the pertinent factors.'' 106 Nev. at 93, 787 P.2d at 780. In doing so, this court provided a nonexhaustive list of factors that a district court should consider when imposing this discovery

---

conclude that Dornan's claims and explanations lack merit and that the district court did not err by grouping Dornan with Foster and Cochrane.

[6]NRCP 37(d) states, in pertinent part:

> If a party or an officer, director, or managing agent of a party or a person designated . . . to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

NRCP 37(b)(2) states, in pertinent part:

> If a party or an officer, director, or managing agent of a party or a person designated . . . to testify on behalf of a party fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . . .
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

sanction. *Id*. In this case, the district court drafted a lengthy strike order, which set forth detailed findings of fact, conclusions of law, and its consideration of each of the *Young* factors. After reviewing the record and the court's order, we conclude that the court's decision to strike defendants' pleadings and enter default was just, related to the claims at issue in the violated discovery order, and supported by a careful written analysis of the pertinent factors.

Additionally, we conclude that appellants' continued discovery abuses and failure to comply with the district court's first sanction order evidences their willful and recalcitrant disregard of the judicial process, which presumably prejudiced Dingwall, Yang, and Chai. *See Hamlett v. Reynolds*, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (upholding the district court's strike order where the defaulting party's ''constant failure to follow [the court's] orders was unexplained and unwarranted''); *In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1236 (9th Cir. 2006) (holding that, with respect to discovery abuses, ''[p]rejudice from unreasonable delay is presumed'' and failure to comply with court orders mandating discovery ''is sufficient prejudice''). In light of appellants' repeated and continued abuses, the policy of adjudicating cases on the merits would not have been furthered in this case, and the ultimate sanctions were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders. Moreover, we conclude that Dornan's, Foster's, and Cochrane's failure to oppose Dingwall's second motion to strike constitutes an admission that the motion was meritorious. *Cf. King v. Cartlidge*, 121 Nev. 926, 927, 124 P.3d 1161, 1162 (2005) (stating that an unopposed motion may be considered as an admission of merit and consent to grant the motion (citing DCR 13(3))).

Accordingly, we affirm the district court's decision to strike Dornan's, Foster's, and Cochrane's pleadings and enter default against them.

Damages award

Dornan, Foster, and Cochrane next argue that the district court erred by awarding compensatory damages to Dingwall, Yang, and Chai, because Dingwall, Yang, and Chai did not provide competent evidence to support the award of damages. In addition, Dornan, Foster, and Cochrane argue that Yang and Chai did not establish a prima facie case for each cause of action because they failed to show that they could prevail at a trial on the merits.

[Headnotes 4-6]

Where default is entered by a district court, the court, if necessary, may conduct a prove-up hearing under NRCP 55(b)(2) to determine the amount of damages. *See Hamlett*, 114 Nev. at 866-67, 963 P.2d at 459. Generally, when an entry of default judgment under NRCP 55(b)(2) is for an uncertain or incalculable sum, the

plaintiff must prove up damages, supported by substantial evidence. *Kelly Broadcasting v. Sovereign Broadcast*, 96 Nev. 188, 193-94, 606 P.2d 1089, 1092 (1980), *superseded by statute on other grounds as stated in Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 742, 192 P.3d 243, 254 (2008); *see also Young v. Johnny Ribeiro Building*, 106 Nev. 88, 94, 787 P.2d 777, 781 (1990). However, where default is entered as a result of a discovery sanction, the nonoffending party ''need only establish a *prima facie* case in order to obtain the default judgment.'' *Young*, 106 Nev. at 94, 787 P.2d at 781.

In our discussion in *Young*, however, we did not clearly outline what evidence is required to prove a prima facie case, particularly, the extent to which a nonoffending party must prove damages. In addition, we have not explicitly reconciled the defaulting party's right to challenge fundamental defects of the nonoffending party's prima facie case for damages with the district court's discretion to conduct the NRCP 55(b)(2) prove-up hearing in a manner it deems appropriate. We therefore take this opportunity to clarify these issues.

[Headnotes 7-9]

Generally, where a district court enters default, the facts alleged in the pleadings will be deemed admitted. *Estate of LoMastro v. American Family Ins.*, 124 Nev. 1060, 1068 n.14, 195 P.3d 339, 345 n.14 (2008). Thus, during an NRCP 55(b)(2) prove-up hearing, the district court shall consider the allegations deemed admitted to determine whether the nonoffending party has established a prima facie case for liability. *Id.* This court has defined a ''prima facie case'' as ''sufficiency of evidence in order to send the question to the jury.'' *Vancheri v. GNLV Corp.*, 105 Nev. 417, 420, 777 P.2d 366, 368 (1989). A prima facie case is supported by sufficient evidence when enough evidence is produced to permit a trier of fact to infer the fact at issue and rule in the party's favor. *Black's Law Dictionary* 1310 (9th ed. 2009).

In *Young*, we affirmed the district court's entry of default and concluded that at the NRCP 55(b)(2) prove-up hearing, the nonoffending party's prima facie accounting was supported by substantial evidence, which included a ''15-page authenticated accounting [summarizing] partnership disbursements, receipts, liabilities and assets.'' 106 Nev. at 94-95, 787 P.2d at 781. And by reviewing the evidence presented and concluding that a prima facie case was established, we impliedly determined that a nonoffending party must sufficiently demonstrate, by substantial evidence, that it is entitled to the damages or relief sought. *Id.*

[Headnotes 10-12]

We also concluded in *Young* that because default was entered as a result of the defaulting party's abusive litigation practices, the de-

faulting party ''forfeited his right to object to all but the most patent and fundamental defects in the accounting.'' *Id.* at 95, 787 P.2d at 781. Indeed, where a district court determines that an NRCP 55(b)(2) prove-up hearing is necessary to determine the amount of damages, the district court has broad discretion to determine how the prove-up hearing should be conducted and the extent to which the offending party may participate. *Hamlett*, 114 Nev. at 866-67, 963 P.2d at 459. The district court, for example, has the discretion to limit the defaulting party's presentation of evidence where the court has determined that the nonoffending party has presented sufficient evidence to establish the essential elements of the prima facie case for which it seeks relief. *Id.* Where, on the other hand, the defaulting party identifies a ''fundamental defect[ ]'' in the nonoffending party's case, it would be an abuse of discretion for the district court to preclude the defaulting party from presenting evidence to challenge the claim. *See Young*, 106 Nev. at 95, 787 P.2d at 781; *Hamlett*, 114 Nev. at 867, 963 P.2d at 459. We note that this is especially true when the nonoffending party seeks monetary damages without demonstrating entitlement to the relief sought or that the damage award is reasonable and accords with the principles of due process.

[Headnotes 13-15]

Following the principles set forth in both *Young* and *Hamlett*, we hold that although allegations in the pleadings are deemed admitted as a result of the entry of default, the admission does not relieve the nonoffending party's obligation to present sufficient evidence to establish a prima facie case, which includes substantial evidence that the damages sought are consistent with the claims for which the nonoffending party seeks compensation. In other words, where the nonoffending party seeks monetary relief, a prima facie case requires the nonoffending party to establish that the offending party's conduct resulted in damages, the amount of which is proven by substantial evidence. *See Vancheri*, 105 Nev. at 420, 777 P.2d at 368. We therefore stress that we do not read *Young* and *Hamlett* as entitling a nonoffending party to unlimited or unjustifiable damages simply because default was entered against the offending party.

Damages awarded to Dingwall

[Headnote 16]

In this case, after holding an NRCP 55(b)(2) prove-up hearing, the district court awarded Dingwall, derivatively on behalf of IESI, compensatory damages totaling approximately $2,890,000. After careful review of the record, we are satisfied that at the

NRCP 55(b)(2) prove-up hearing, Dingwall presented sufficient evidence to support a prima facie case for each derivative cause of action.[7] Accordingly, we conclude that the district court did not err for three reasons. First, we conclude that the factual allegations contained in Dingwall's third amended complaint sufficiently established the elements necessarily required to prove each claim. Importantly, Dingwall's allegations demonstrated that he was entitled to the relief sought as it related to each cause of action.

Second, Dingwall presented substantial evidence at the prove-up hearing to support his claim for damages. Dingwall testified that he arrived at his estimate of damages by working with a certified public accountant to review roughly 50,000 pages of documents gathered over at least two years. For each cause of action, Dingwall presented charts and other demonstrative evidence to the court to prove how he arrived at the amount of damages for that particular cause of action. For example, for his breach of fiduciary duty claim, Dingwall presented evidence to show that as directors of IESI, Foster used corporate funds to advance a competing entity (IESI Canada); that Dornan, Foster, and Cochrane used IESI corporate funds for their personal benefits; and that advances were made toward a company that had no business relationship with IESI. *See Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) (providing that a breach of fiduciary duty claim requires an injury resulting from the tortious conduct of the defendant who owes a fiduciary duty to the plaintiff). Dingwall then demonstrated how he estimated and calculated the damages as a result of these indiscretions.

Third, the district court did not unnecessarily prevent Dornan, Foster, and Cochrane from participating in the prove-up hearing. Dornan, Foster, and Cochrane cross-examined Dingwall, and although the court allowed them the opportunity, they declined to cross-examine Dingwall's certified public accountant. Thus, there is no indication that the court abused its discretion when conducting the prove-up hearing.

Accordingly, we conclude that the district court did not err by awarding compensatory damages to Dingwall because he presented a prima facie case for each cause of action, including substantial evidence that the damages sought were related to the asserted causes of action, and the damages were calculated to compensate for the harm.

---

[7]Dingwall asserted causes of action for: breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duties, constructive fraud, intentional misrepresentation, conversion, and indemnity. We note that certain causes of action listed in footnote 1 had been subsequently abandoned by Dingwall throughout the litigation.

Damages awarded to Yang and Chai

At the NRCP 55(b)(2) prove-up hearing, the district court awarded compensatory damages of $15,000,000 to Yang and Chai, individually. However, we conclude that the district court committed error when it awarded compensatory damages to Yang and Chai because the award was duplicative, and even if it was not duplicative, Yang and Chai did not present substantial evidence to support the amount of damages sought.[8]

[Headnote 17]

At the outset, we reject Foster's and Cochrane's argument that damages awarded to Yang and Chai were improper because Yang and Chai did not demonstrate that they could prevail on the merits at trial. Where default is entered as a discovery sanction, the nonoffending party is not required to prove likelihood of success on the merits; rather, it is only required to prove a prima facie case to support its claims. *See Young v. Johnny Ribeiro Building*, 106 Nev. 88, 94, 787 P.2d 777, 781 (1990).

[Headnote 18]

The claims under which Yang and Chai sought individual recovery were not clearly set forth in either their second amended complaint or at the prove-up hearing, at which only Yang testified; however, it appears that Yang and Chai sought to recover individually for either intentional or negligent misrepresentation, alleging that they were wrongfully induced by Dornan, Foster, and Cochrane into selling or transferring their stock. At the prove-up hearing, Yang was asked what relief he and Chai sought for their misrepresentation claim. Yang and Chai principally sought declaratory judgment—the reinstatement of their stock ownership and the cancellation of Dornan's, Foster's, and Cochrane's stock—which the district court granted. Yang and Chai did not plainly seek monetary damages under that cause of action. Therefore, by awarding both declaratory relief—the reinstatement of Yang and Chai's stock—and monetary relief—$15,000,000—we conclude that the award resulted in duplicative recovery for a single cause of action.

[Headnote 19]

Even if the award was not duplicative, Yang and Chai did not present sufficient evidence to establish a prima facie case for intentional or negligent misrepresentation. *See Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007) (providing the elements of intentional misrepresentation: ''(1) a false representation that is

---

[8]Yang and Chai also sought monetary damages derivatively, on behalf of IESI, for various causes of action. Because the court did not award Yang and Chai derivative relief, we do not discuss whether substantial evidence supported those claims.

made with either knowledge or belief that it is false . . . , (2) an intent to induce another's reliance, and (3) damages that result from this reliance''); *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998) (providing that one who, without exercising reasonable care or competence, ''supplies false information for the guidance of others in their business transactions'' is liable for ''pecuniary loss caused to them by their justifiable reliance upon the information''). Both causes of action require a showing that damages resulted from the tortious misrepresentations. *Nelson*, 123 Nev. at 225, 163 P.3d at 426; *Barmettler*, 114 Nev. at 449, 956 P.2d at 1387. And although default was entered in this case and the pleadings were deemed admitted, *see Estate of LoMastro v. American Family Ins.*, 124 Nev. 1060, 1068 n.14, 195 P.3d 339, 345 n.14 (2008), the admission of the pleadings did not relieve Yang and Chai of their responsibility to show that they were entitled to relief and that the amount of damages sought corresponded with the asserted causes of action. In other words, because both intentional and negligent misrepresentation require a showing that the claimed damages were caused by the alleged misrepresentations, *Nelson*, 123 Nev. at 225, 163 P.3d at 426; *Barmettler*, 114 Nev. at 449, 956 P.2d at 1387, it was not sufficient for Yang and Chai to merely assert the fact that they were damaged without showing substantial evidence that the amount of damages sought were both attributed to the tortious misrepresentation and intended to compensate Yang and Chai for the harm caused by the misrepresentation. *See Miller v. Schnitzer*, 78 Nev. 301, 309, 371 P.2d 824, 828 (1962), *abrogated on other grounds by Ace Truck v. Kahn*, 103 Nev. 503, 508, 746 P.2d 132, 135-36 (1987), *abrogated on other grounds by Bongiovi v. Sullivan*, 122 Nev. 556, 582-83, 138 P.3d 433, 451-52 (2006).

Therefore, because the award was duplicative, and because Yang did not present substantial evidence to show that $15,000,000—the amount of damages awarded—was related to the harm caused, we reverse the award of compensatory damages to Yang and Chai.

Attorney fees

The district court awarded Dingwall, Yang, and Chai attorney fees after it entered default judgment against Dornan, Foster, and Cochrane for their wrongful conduct, particularly their failure to comply with the court's March 1, 2007, discovery order and the fact that their claims and defenses were frivolous, asserted in bad faith, and not based in law or fact.

[Headnote 20]

Foster and Cochrane argue that the district court erred by awarding attorney fees to Dingwall, Yang, and Chai because they each recovered more than $20,000, and thus were not entitled to attor-

ney fees under NRS 18.010(2)(a). Dornan did not challenge the award of attorney fees. This court will review a district court's grant of attorney fees for abuse of discretion. *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006).

[Headnote 21]

We conclude that the award of attorney fees was proper. In a lengthy and exhaustive judgment, the district court expressly recited the repetitive, abusive, and recalcitrant actions of Dornan, Foster, and Cochrane and found that their claims and defenses were not based in law or fact and as such were frivolous and asserted in bad faith. First, appellants failed to cooperate and comply with the district court's discovery order. NRCP 37(b)(2) permits the district court to require the offending party to pay reasonable attorney fees as sanctions for discovery abuses. Second, appellants' claims and defenses were frivolous and not based in law or fact. NRS 18.010(2)(b) permits a district court to award attorney fees when a party's claims or defenses are brought without a reasonable ground or to harass the prevailing party. After reviewing the judgment and record, we conclude that the district court did not abuse its discretion in awarding attorney fees. Because the district court did not abuse its discretion, we affirm the district court's award of attorney fees.

Special-master fees

Foster and Cochrane also argue that, because the parties had reached a cost-sharing agreement as to how the special-master fees would be split, the district court abused its discretion by ordering the defendants jointly and severally liable for special-master fees.

[Headnote 22]

Because the appointment of a special master is within the district court's discretion, and because a special master is entitled to a reasonable remuneration for his or her services, this court will review the district court's award of special-master fees for abuse of discretion. *See State v. District Court*, 152 P.3d 566, 570 (Idaho 2007); 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2608 (3d ed. 2008).

[Headnote 23]

In this case, the district court held a hearing concerning the appointment of a special master. During the hearing, the parties and the court discussed how the special-master fees would be allocated. Foster and Cochrane argue that the parties agreed to split the fees 50/50. However, after the parties agreed to split the fees 50/50, the district court clearly communicated that the special-master fees

would be recoverable at the end of the case by the prevailing party. Neither party objected to the court's conclusion that special-master fees were recoverable by the prevailing party.

Thus, we conclude that when the district court entered default against Dornan, Foster, and Cochrane, it essentially determined that Dingwall, Yang, and Chai were the prevailing parties. Therefore, it was within the court's discretion to order Dornan, Foster, and Cochrane to pay the special-master fees.

CONCLUSION

We conclude that the court's decision to strike Dornan's, Foster's, and Cochrane's pleadings was supported by sufficient evidence under the factors set forth in *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990). Because we conclude that at the NRCP 55(b)(2) prove-up hearing Dingwall presented sufficient evidence to support a prima facie case for each cause of action, including substantial evidence that demonstrated that the amount of damages was related to each claim, we affirm the district court's award of compensatory damages to Dingwall. However, we reverse the award of damages to Yang and Chai because it was duplicative and not supported by evidence showing that it was related to the claims or calculated to compensate for the harm caused. Additionally, because we conclude that Dingwall, Yang, and Chai were properly entitled to attorney fees, we affirm the district court's award. Finally, we affirm the district court's order compelling Dornan, Foster, and Cochrane to pay the special-master fees.

Accordingly, we affirm in part and reverse in part the district court's judgment.

PARRAGUIRRE, C.J., and DOUGLAS and GIBBONS, JJ., concur.

CHERRY, J., with whom SAITTA and PICKERING, JJ., agree, concurring in part and dissenting in part:

I concur with my colleagues in the majority in reversing the award of damages to Yang and Chai because it was duplicative and not supported by evidence showing that it was related to the claim or calculated to compensate for harm caused. However, I respectfully dissent from my colleagues as to the striking of the pleadings filed by Dornan, Foster, and Cochrane. The majority concludes that the court's decision to strike the above-mentioned pleadings was supported by sufficient evidence under the factors set forth in *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 787 P.2d 777 (1990). I respectfully disagree.

As to Dornan, Foster, and Cochrane, I would hold the following: (1) these parties did not display the requisite degree of willfulness necessary to support the striking of pleadings and ordering

of sanctions under *Young*; (2) Dornan suffered from health problems; (3) Dornan did not act willfully because he reasonably believed that the IESI bankruptcy stayed discovery; (4) Dornan was unable to comply with Dingwall's discovery requests; (5) the district court failed to properly consider Dornan's justification for noncompliance; (6) the sanction was too severe in light of the totality of the circumstances, and lesser sanctions would have been adequate to remedy the situation; (7) the district court erred when it assumed prejudice to Dingwall; (8) the district court did not consider the feasibility and fairness of alternative, less severe sanctions; and (9) Dornan, Foster, and Cochrane were denied a trial on the merits concerning liability and also were denied a trial on the merits concerning damages. I also question how the sanctioning of these parties is just, fair, and has a deterrent purpose as to other cases in our state.

For these reasons, I must dissent as to the striking of pleadings filed on behalf of Dornan, Foster, and Cochrane.

NEVADA ATTORNEY FOR INJURED WORKERS, AND STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, DIVISION OF INDUSTRIAL RELATIONS, APPELLANTS, *v.* NEVADA SELF-INSURERS ASSOCIATION, RESPONDENT.

No. 51859

February 25, 2010 225 P.3d 1265

Appeal from a district court order granting declaratory and injunctive relief in an action regarding the amendment of administrative regulations. Eighth Judicial District Court, Clark County; David Wall, Judge.

Association of self-insurers brought action for declaratory relief from Department of Business and Industry, Division of Industrial Relations (DIR) regulation that allowed physicians to consider a workers' compensation claimant's ability to perform activities of daily living when evaluating work-related spinal injuries. The district court granted declaratory relief. DIR appealed. The supreme court, HARDESTY, J., held that physicians and chiropractors providing permanent partial disability impairment ratings for spinal injuries could consider ability to perform activities of daily living.

Reversed.

Nancyann Leeder, Carson City, for Appellant Nevada Attorney for Injured Workers.

Nancy E. Wong, Carson City, for Appellant State of Nevada Department of Business and Industry, Division of Industrial Relations.

Lionel Sawyer & Collins and *Malani L. Kotchka*, Las Vegas, for Respondent.

Anderson & Gruenewald and *Barbara Gruenewald*, Reno, for Amicus Curiae Nevada Justice Association.

1. DECLARATORY JUDGMENT.
   Declaratory relief action by association of self-insurers, rather than petition for judicial review, was the appropriate mechanism by which to challenge Department of Business and Industry, Division of Industrial Relations (DIR) decision to allow physicians to consider claimant's ability to perform activities of daily living when evaluating work-related spinal injuries in workers' compensation cases; association challenged DIR regulation as being in excess of its statutory authority.
2. APPEAL AND ERROR.
   The supreme court reviews a district court's statutory construction determination de novo.
3. ADMINISTRATIVE LAW AND PROCEDURE; STATUTES.
   When examining whether an administrative regulation is valid, supreme court will generally defer to the agency's interpretation of a statute that the agency is charged with enforcing, but supreme court will not defer to the agency's interpretation if, for instance, the regulation conflicts with existing statutory provisions or exceeds the statutory authority of the agency.
4. STATUTES.
   When the language of a statute is plain and subject to only one interpretation, the supreme court will give effect to that meaning and will not consider outside sources beyond that statute; but, when the statute is ambiguous and subject to more than one interpretation, the court will evaluate legislative intent and similar statutory provisions.
5. STATUTES.
   The supreme court determines the Legislature's intent by construing the statute in a manner that conforms to reason and public policy.
6. STATUTES.
   Whenever possible, the supreme court interprets statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.
7. STATUTES.
   The supreme court presumes that the Legislature enacted a statute with full knowledge of existing statutes relating to the same subject.
8. WORKERS' COMPENSATION.
   Physicians and chiropractors providing permanent partial disability impairment rating of workers' compensation claimants with spinal injuries could consider ability to perform activities of daily living, including loss of motion, sensation, and strength, although statutes prohibited compensation for subjective complaints of pain without any objectively identifiable spinal injury; existence of permanent physical impairment was prerequisite to consideration of activities of daily living, not considering them was akin to prohibiting consideration of patient's history or diagnostic tests, and considering them produced more reliable, accurate impairment ratings. NRS 616C.110(2)(c), 616C.490(5).

9. STATUTES.
The supreme court considers, when interpreting a statute, legislators' statements when they are a reiteration of events leading to the adoption of proposed amendments.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we consider whether a workers' compensation regulation contradicts the statutory provisions for determining the percentage of an employee's disability resulting from a work-related spinal injury. Respondent Nevada Self-Insurers Association (the Association) filed a petition with appellant State of Nevada Department of Business and Industry, Division of Industrial Relations (DIR), requesting that DIR amend one of its regulations to conform to statutory provisions that prohibit physicians from considering factors other than a person's physical impairment when evaluating a work-related injury. After DIR denied the Association's petition, the Association filed a complaint for declaratory relief in the district court, which the district court granted, concluding that DIR's regulation violated applicable statutory provisions by allowing physicians to consider a person's ability to perform activities of daily living.

NRS 616C.110(1) requires that DIR adopt the fifth edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (Linda Cocchiarella & Gunnar B.J. Andersson eds., 5th ed. 2000) (AMA *Guides*), for use in all permanent partial disability examinations. NRS 616C.110(2) also authorizes DIR to amend the applicable regulations, as it deems appropriate, but those amendments ''[m]ust not consider any factors other than the degree of physical impairment of the whole man in calculating the entitlement to compensation.'' NRS 616C.110(2)(c). In accordance with this statute, DIR adopted a regulation incorporating the fifth edition and also adopted NAC 616C.476, which prohibits the utilization of certain chapters of the AMA *Guides* but implicitly permits physicians and chiropractors to consider a person's ability to perform activities of daily living when making a disability impairment rating for spinal injuries.

The Association maintains that language in NRS 616C.110(2)(c) and NRS 616C.490(5) providing that, in calculating an employee's entitlement to compensation for a permanent partial disability, the only factor to be considered is ''the degree of physical impairment of the whole man,'' prohibits consideration of activities of daily living. Thus, the parties to this appeal dispute whether allowing

rating physicians to take into account a spinal injury's impact on a person's activities of daily living is an improper consideration of pain—something other than ''physical impairment''—in violation of Nevada law.

We determine that Nevada's statutory scheme and the adoption of the fifth edition of the AMA *Guides* indicate the Legislature's intent that activities of daily living should be taken into consideration when evaluating work-related spinal injuries. We conclude that evaluating activities of daily living is not an improper consideration of subjective pain complaints or chronic pain because, prior to assessing a person's ability to perform activities of daily living, an objectively identifiable spinal injury must be present; thus, NAC 616C.476 does not violate NRS 616C.110(2)(c) or NRS 616C.490(5).[1] Accordingly, we reverse the order of the district court.

FACTS AND PROCEDURAL HISTORY

The AMA Guides, fifth edition

The AMA *Guides* was originally published in 1971 to establish ''a standardized, objective approach to evaluating medical impairments'' for purposes of workers' compensation benefits. AMA *Guides*, *supra*, § 1.1, at 1. The AMA *Guides* set forth impairment criteria that certified rating physicians and chiropractors are able to use to evaluate injured workers and give them an ''[i]mpairment percentage[ ] or rating[ ].'' *Id.* § 1.2, at 4.

Impairment ratings reflect functional limitation, rather than disability, and demonstrate the severity of the medical condition and the ''degree to which the impairment decreases an individual's ability to perform common activities of daily living.'' *Id.* Activities of daily living do not include work activities, and instead consist of everyday activities such as: self-care, personal hygiene, communication, physical activity (sitting, standing, walking, reclining, climbing stairs), sensory function (taste, smell, tactile feeling,

---

[1]In 2009, the Legislature amended NRS 616C.110 and NRS 616C.490. *See* 2009 Nev. Stat., ch. 500, §§ 3, 7, at 3032-33, 3036-37. This opinion refers to the 2009 versions of NRS 616C.110 and NRS 616C.490. Appellant Nevada Attorney for Injured Workers (NAIW) filed a supplemental reply brief regarding the 2009 amendments. The Association filed a motion to strike the supplemental brief, noting that NAIW did not seek leave from this court to file the supplemental brief. *See* NRAP 28(c). NAIW filed an opposition to the motion to strike and a countermotion for leave to file the supplemental brief. Having reviewed the motion, the opposition, and countermotion for leave, and the supplemental brief, we conclude that the supplemental brief and the 2009 legislative amendments do not assist this court in resolving the issues in this appeal. Accordingly, we grant the Association's motion to strike and deny NAIW's countermotion for leave. The clerk of this court shall strike the supplemental reply brief filed on June 26, 2009.

sight, hearing), nonspecialized hand activity (grasping, lifting, tactile discrimination), travel (riding, driving, flying), sexual function, and sleep. *Id.*

To evaluate the severity that a person's injury has on activities of daily living, a physician applies his or her ''knowledge of the patient's medical condition and clinical judgment.'' *Id.* § 1.2, at 5. Once the rating physician or chiropractor determines the impairment rating, then the insurance provider considers the impairment rating in conjunction with other factors, such as the worker's age, education, and previous experience, to establish disability. *See id.* § 1.2, at 8; NRS 616C.490(2).

Chapter 15 of the fifth edition of the AMA *Guides*, governing injuries of the spine, is most frequently used for impairment evaluations. *See* Steven Babitsky & James J. Mangraviti, Jr., *Understanding the AMA Guides in Workers' Compensation* § 4.05 (4th ed. 2008) (*Understanding the AMA Guides*). Under the more utilized of the two methods for determining spinal impairment ratings,[2] there are different categories of spine impairments. AMA *Guides*, *supra*, § 15.4, at 384. Distinguishable from the fourth edition of the AMA *Guides*, the fifth edition provides that an impairment rating for each category can be adjusted up to three percent to account for treatment results and their impact on a person's ability to complete activities of daily living. *See Understanding the AMA Guides*, *supra*, § 4.02(E); *see* AMA *Guides*, *supra*, § 15.4, at 384. Notably, to award the additional range of up to 3 percent, objective medical evidence must establish that a permanent physical impairment exists. *Understanding the AMA Guides*, *supra*, § 4.05(C). Physicians are instructed that ''[a] complaint of continuing pain does not in itself justify increasing the rating because this is expected with spinal injuries.'' *Id.*

Nevada statutes and regulations concerning the fifth edition of the AMA Guides

In 2003, the Legislature mandated that the DIR adopt regulations that incorporate the fifth edition of the AMA *Guides* by reference (Nevada was previously operating under the fourth edition). *See* 2003 Nev. Stat., ch. 305, § 7, at 1671. The Legislature also granted DIR authority to amend its regulations after it adopted the AMA *Guides*, subject to certain limitations. *Id.* at 1671-72. DIR's amendments ''(a) [m]ust be consistent with the . . . [AMA *Guides*] . . . ; (b) [m]ust not incorporate any contradictory matter

[2]The primary methodology is the diagnosis-related estimate method. AMA *Guides*, *supra*, § 15.2, at 379. The alternate methodology, the range-of-motion method, is generally utilized when the cause of an impairment is undetermined. *Id.*

from any other edition of the [AMA *Guides*]; and, (c) [m]ust not consider any factors other than the degree of physical impairment of the whole man in calculating the entitlement to compensation.'' *Id.*; NRS 616C.110(2).

Similarly, NRS 616C.490(5), governing permanent partial disability compensation, echoes NRS 616C.110(2)(c) and provides:

> Unless the regulations adopted pursuant to NRS 616C.110 provide otherwise, a rating evaluation must include an evaluation of the loss of motion, sensation and strength of an injured employee if the injury is of a type that might have caused such a loss. *No factors other than the degree of physical impairment of the whole man may be considered in calculating the entitlement to compensation for a permanent partial disability*.

(Emphasis added.) Pursuant to the Legislature's 2003 mandate, DIR adopted the fifth edition of the AMA *Guides*. NAC 616C.002(1). DIR also adopted NAC 616C.476, which reiterates NRS 616C.110(2)(c)'s and NRS 616C.490(5)'s prohibition on considering anything other than physical impairment:

> 1. A rating physician or chiropractor who performs an evaluation of a permanent partial disability shall evaluate the industrial injury or occupational disease of the injured employee as it exists at the time of the rating evaluation. The rating physician or chiropractor shall take into account any improvement or worsening of the industrial injury or occupational disease that has resulted from treatment of the industrial injury or occupational disease. *The rating physician or chiropractor shall not consider any factor other than the degree of physical impairment of the whole man in calculating the entitlement to compensation*.
>
> 2. In performing an evaluation of a permanent partial disability, a rating physician or chiropractor *shall not use*:
>
> (a) Chapter 14, ''Mental and Behavioral Disorders,'' of the *Guide*; or
>
> (b) Chapter 18, ''Pain,'' of the *Guide*.

(Emphases added.) Thus, in determining the percentage of impairment in an evaluation of a permanent partial disability, rating physicians and chiropractors are only prohibited from using the chapters on mental and behavioral disorders and pain.

DIR proceedings

After DIR enacted NAC 616C.476, the Association filed a petition with DIR, requesting that it ''amend NAC 616C.476 to include a section providing that a rating physician must not consider

activities of daily living in determining the percentage of disability for the spine.''[3] The Association argued that allowing rating physicians to consider activities of daily living when rating the percentage of disability of the spine would permit recovery for subjective complaints of pain, which contradicted NRS 616C.110(2)(c)'s requirement, reiterated in NRS 616C.490(5), that DIR's regulations ''[m]ust not consider any factors other than the degree of physical impairment of the whole man in calculating the entitlement to compensation.''[4]

DIR conducted a public workshop, *see* NRS 233B.061(2), where it heard testimony from six certified rating physicians, four of whom testified for the Association. Three of the Association's physician witnesses testified that an injury's impact on activities of daily living is subjective and often due to pain. Another testified that a physical impairment influences performance of activities of daily living but an inability to perform activities of daily living is not an impairment in itself. These physicians also testified that the consideration of activities of daily living is only one tool (among others such as diagnostic tests, physical examinations, patient history, and clinical judgment) that is utilized to make a determination regarding a person's physical impairment and that none of the tools, individually, amounts to a physical impairment that entitles a person to compensation.

NAIW participated in the workshop and presented the testimony of two physicians, including Linda Cocchiarella, who is one of the editors of the fifth edition of the AMA *Guides* and a trainer and expert on the use of the AMA *Guides*.[5] Dr. Cocchiarella testified that consideration of activities of daily living is required for appropriate use of the AMA *Guides*; otherwise, the reliability of the ratings is negatively impacted. Dr. Cocchiarella further explained that activities of daily living are not purely subjective because the physician must use other information to validate the information that the patient provides, including questionnaires, physical therapy history, observation, and a functional capacity evaluation. Additionally, in making the impairment rating, the

---

[3]The Association's petition concerned spinal injuries only. The Association did not request that DIR prohibit the consideration of activities of daily living in the evaluation of other industrial injuries or occupational diseases.

[4]NRS 233B.100 permits ''[a]ny interested person [to] petition an agency [to] request[ ] the . . . amendment . . . of any regulation.'' If the agency does not deny the petition, then it must proceed with the regulation-making process, including holding a public workshop and public hearing. *See* NRS 233B.100; NRS 233B.061.

[5]Dr. Cocchiarella also co-authored a book that instructs rating physicians how to utilize the AMA *Guides* properly when making impairment ratings for permanent partial disabilities. *See* Linda Cocchiarella and Stephen J. Lord, *Master the AMA Guides Fifth: A Medical and Legal Transition to the Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

physician must first determine whether the patient has a physical impairment and, if so, only then does the physician evaluate the impact that the impairment has on the patient's activities of daily living.

After DIR held the public workshop, but before it issued a decision, the Legislative Counsel Bureau (LCB), in a letter to Assemblywoman Barbara Buckley, addressed whether DIR ''may exclude the portion of chapter 15 of the 5th edition of the AMA Guides that relates to the ability to engage in activities of daily living.'' *See* LCB Letter to Assemblywoman Buckley in response to her question on this issue (March 30, 2004). LCB opined that ''the portion of Chapter 15 [of the AMA *Guides*] at issue *must* be excluded from use, for the purposes of rating a permanent partial disability, *if* that material provides for compensation for impairments beyond physical impairments and *must not* be excluded otherwise.'' (Second emphasis added.) Therefore, LCB determined that the issue was whether consideration of activities of daily living is something other than ''physical impairment,'' as prohibited by NRS 616C.110(2)(c) and NRS 616C.490(5).

DIR concluded that ''NRS 616C.490(5) does not require the exclusion of the portion of Chapter 15 of the Fifth Edition of the [AMA *Guides*] that relates to the ability to engage in activities of daily living[.]'' DIR was persuaded by the variation between the fifth edition and earlier editions regarding activities of daily living, namely, that the fifth edition provides: ''Only impairments that interfere with activities of daily living qualify for an impairment rating based on the [AMA] *Guides*. Such impairments are ratable in terms of a percentage of the whole person.'' DIR assumed that the Legislature was aware of the changes made in the fifth edition of the AMA *Guides* regarding the use of activities of daily living, thus intending that rating physicians use activities of daily living as a consideration in measuring physical impairment of spinal injuries.

Moreover, according to DIR, because the Legislature stated in NRS 616C.490 that the evaluation of the injured employee ''should include an evaluation of the loss of motion, sensation and strength,'' the Legislature intended to include consideration of the functional abilities of the employee when calculating ''the degree of physical impairment of the whole man.'' As a result, DIR concluded that NRS 616C.490(5) does not require that DIR amend NAC 616C.476 to exclude consideration of activities of daily living for spinal injuries.

District court proceedings

After DIR denied the Association's petition, the Association filed a complaint for declaratory and permanent injunctive relief in district court. In its complaint, the Association relied on a 1998

Eighth Judicial District Court case in which that court reviewed a 1997 DIR regulation that provided that subjective spinal pain without objective physical examination findings was additionally compensable up to four percent. *Nevada Self-Insurers Ass'n v. State of Nevada, Dep't of Bus. & Indus., Div. of Indus. Relations*, No. A377851 (Nev. Dist. Ct. June 1, 1998). In that case, the district court concluded that ''[s]ubjective complaints of pain or limitations even if repeated and consistent do not become objective findings that would allow a physician to determine that an injured employee is suffering from a physical impairment,'' as required by NRS 616C.110 or NRS 616C.490. *Id.* The district court further determined that DIR's chronic-pain regulation violated Nevada's statutory provisions, and the district court permanently enjoined DIR from considering subjective pain complaints that lack physical findings in compensating permanent partial disabilities for spinal impairments.

Based on the district court's determination in 1998, the Association alleged in the district court proceedings in this case that because NAC 616C.476 allows rating physicians to consider limitations on activities of daily living, including subjective pain, when rendering an impairment rating for a person's spine injury under chapter 15 of the AMA *Guides*, such a rating considers something other than physical impairment in violation of NRS 616C.110(2)(c) and NRS 616C.490(5). Thus, the Association argued, NAC 616C.476 must be amended.

Below, the district court took notice of the 1998 case and acknowledged a statement made by Assemblywoman Chris Guinchigliani during a 2003 legislative hearing on the amendment to NRS 616C.110—''we do not do pain in Nevada.'' Hearing on A.B. 168 Before the Assembly Commerce and Labor Comm., 72nd Leg. (Nev., March 21, 2003). The district court further acknowledged LCB's 2004 letter to Assemblywoman Buckley providing that any part of chapter 15 of the fifth edition to the AMA *Guides* that provides for compensation for anything other than physical impairment was impermissible. The district court found that the testimony of the Association's witnesses—who opined that consideration of activities of daily living and subsequent ratings based thereon would constitute a rating for pain and would be something other than physical impairment—was credible and gave their testimony considerable weight because they were DIR-certified rating physicians.

The district court then made the following conclusions: (1) the declaratory relief action was proper pursuant to NRS 233B.110, (2) an agency's statutory construction is a legal question subject to de novo review, and (3) the legislative intent of NRS 616C.110(2)(c) and NRS 616C.490(5) clearly evidences that DIR erred by permitting rating physicians to consider something other

than the degree of physical impairment with respect to spine injury ratings. The district court granted the Association's complaint for declaratory relief, mandating that DIR amend NAC 616C.476 to prohibit physicians from adjusting ratings an additional one to three percent for limitations on activities of daily living when determining the percentage of impairment for spinal injuries under chapter 15 of the fifth edition of the AMA *Guides*. DIR and NAIW now appeal.[6]

DISCUSSION

Standard of review

[Headnotes 1, 2]

In granting the Association's complaint for declaratory relief, the district court interpreted and applied NRS 616C.110 and NRS 616C.490.[7] We review a district court's statutory construction determination de novo. *Sonia F. v. Dist. Ct.*, 125 Nev. 495, 499, 215 P.3d 705, 707 (2009).

[Headnote 3]

When examining whether an administrative regulation is valid, we will generally defer to the ''agency's interpretation of a statute that the agency is charged with enforcing.'' *State, Div. of Insurance v. State Farm*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). However, we will not defer to the agency's interpretation if, for instance, the regulation ''conflicts with existing statutory provisions or exceeds the statutory authority of the agency.'' *Id.* We have established that ''administrative regulations cannot contradict the statute they are designed to implement.'' *Jerry's Nugget v. Keith*, 111 Nev. 49, 54, 888 P.2d 921, 924 (1995). The Association contends that NAC 616C.476 violates NRS 616C.110(2)(c) and NRS 616C.490(5).

---

[6]NAIW also moved for a stay of the district court's judgment pending appeal, which the district court granted in part, permitting rating physicians and chiropractors to ''make and record upwards adjustments of up to 3%'' when conducting permanent partial disability evaluations. However, the district court further ordered that if a person's permanent partial disability evaluation includes an award due to the impact of activities of daily living, ''payment by the workers' compensation insurer of that portion of the PPD award related to [activities of daily living] is stayed through the date of a decision by the Nevada Supreme Court.''

[7]DIR and NAIW argue that the Association inappropriately filed an action for declaratory relief because DIR's decision was reviewable via a petition for judicial review under NRS 616D.150. We conclude that NRS 233B.110(1) is the applicable statute in this case because the Association challenged NAC 616C.476 as being in excess of DIR's statutory authority and a violation of NRS 616C.110(2)(c) and NRS 616C.490(5). Accordingly, we conclude that the Association's declaratory relief action was the appropriate mechanism by which to challenge DIR's decision.

NAC 616C.476 does not violate NRS 616C.110(2)(c) and NRS 616C.490(5)'s mandate that only a person's ''physical impairment'' can be considered when making an impairment rating

[Headnotes 4, 5]

When the language of a statute is plain and subject to only one interpretation, we will give effect to that meaning and will not consider outside sources beyond that statute. *State Farm*, 116 Nev. at 293, 995 P.2d at 485. However, when the statute is ambiguous and subject to more than one interpretation, we will evaluate legislative intent and similar statutory provisions. *Id*. at 294, 995 P.2d at 485. We determine the Legislature's intent by construing the statute in a manner that conforms to reason and public policy. *Bacher v. State Engineer*, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006).

[Headnotes 6, 7]

Whenever possible, we interpret ''statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.'' *Allstate Insurance Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009). We presume that the Legislature enacted the statute '' 'with full knowledge of existing statutes relating to the same subject.' '' *State Farm*, 116 Nev. at 295, 995 P.2d at 486 (quoting *City of Boulder v. General Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985)).

[Headnote 8]

The Association argues that NAC 616C.476 violates NRS 616C.110(2)(c) and NRS 616C.490(5)'s mandate that only a person's ''physical impairment'' can be considered when making a spinal impairment rating. According to the Association, permitting consideration of activities of daily living is subjective and constitutes an improper consideration of pain, which is not a ''physical impairment.''[8] DIR and NAIW contend, on the other hand, that because the AMA *Guides* require that the impact on activities of daily living be assessed in rendering rating impairment evaluations, activities of daily living must be considered in order to give effect to NRS 616C.110's requirement that the AMA *Guides* be adopted. We conclude that both interpretations of NRS 616C.110(2)(c) and

---

[8]The Association argues that this court's decision in *Maxwell v. SIIS*, 109 Nev. 327, 849 P.2d 267 (1993), supports its position that an evaluation of ''physical impairment'' cannot include consideration of activities of daily living. In *Maxwell*, this court held that a claimant could not recover for a psychological injury because it does not constitute a physical impairment. *Id*. at 331, 849 P.2d at 270. However, we conclude that *Maxwell* is inapposite to this case because, here, the issue is whether consideration of activities of daily living can be used as one factor to determine the extent of a person's physical impairment—and the inability to perform activities of daily living is not, in itself, a physical injury for which a person can seek to receive compensation.

NRS 616C.490(5) are reasonable; thus, we determine that there is an ambiguity in the language of the statutes.

We also note that both NRS 616C.110(2)(c) and NRS 616C.490(5) provide that in examinations of a permanent partial disability, rating physicians and chiropractors must not consider any ''factors other than the degree of physical impairment of the whole man,'' but neither statute defines ''physical impairment'' or ''permanent partial disability.'' Moreover, although NRS 616C.490(1) provides that, for purposes of that section, the terms '' 'disability' and 'impairment of the whole man' are equivalent terms,'' the word ''disability'' is not defined in that statute or any other statute in Nevada's Industrial Insurance Act. *See* NRS 616A.005 (noting that Chapters 616A to 616D, inclusive, of NRS shall be known as the Nevada Industrial Insurance Act).[9] The absence of these definitions further illustrates the ambiguity in NRS 616C.110(2)(c) and NRS 616C.490(5). Therefore, to resolve the ambiguity, we turn to legislative intent and public policy considerations to determine the appropriate evaluation of physical impairment in the determination of a permanent partial disability resulting from a spinal injury.

Legislative intent and public policy

[Headnote 9]

When this court interprets a statute, we consider legislators' statements ''when they are a reiteration of events leading to the adoption of proposed amendments.'' *Khoury v. Maryland Casualty Co.*, 108 Nev. 1037, 1040, 843 P.2d 822, 824 (1992), *disapproved of on other grounds by Breithaupt v. USAA Property and Casualty*, 110 Nev. 31, 34-35, 867 P.2d 402, 405 (1994). The Association relies on the following statement made by Assemblywoman Chris Giunchigliani during a 2003 legislative hearing on the amendment to NRS 616C.110:

> The AMA *Guide*[*s*], everybody felt comfortable enough [adopting the fifth edition], because *we do not do pain in Nevada*. . . . [DIR is] also allowed . . . to make modification, so they can select certain sections out of the *Guide*[*s*] that they will not implement and let them use for rating purposes.

Hearing on A.B. 168 Before the Assembly Commerce and Labor Comm., 72nd Leg. (Nev., March 21, 2003) (emphasis added).

---

[9]NRS 616A.340 defines ''total disability'' as an ''incapacity resulting from an accident arising out of and in the course of employment which prevents the covered workman from engaging, for remuneration or profit, in any occupation for which he is or becomes reasonably fitted by education, training or experience.'' However, this definition is not instructive regarding the definition of permanent partial disability, which is at issue in this case.

The Association argues that this statement demonstrates that the Legislature intended to prohibit rating physicians and chiropractors from considering pain in making impairment ratings for spinal injuries.

After reviewing the legislative history surrounding the amendment of NRS 616C.110, we determine that the Legislature's discussions regarding pain center on compensation on the basis of chronic pain alone, not whether a person's ability to perform activities of daily living may be evaluated as one tool in making an impairment rating for spinal injuries. The legislative history surrounding NRS 616C.110 is, therefore, not instructive regarding the consideration of activities of daily living. Consequently, we next evaluate what reason and public policy suggest the Legislature intended.

NRS 616C.490(5) specifies that ''a rating evaluation *must* include an evaluation of the loss of motion, sensation and strength of an injured employee if the injury is of a type that might have caused such a loss.'' (Emphasis added.) In harmonizing this statutory language with the rest of the language in the statute, we determine that the loss of motion, sensation, and strength are factors that describe the physical impairment of the whole man. Because the loss of motion, sensation, and strength are all factors that influence the impact of a spinal injury on a person's ability to perform activities of daily living, we determine that this statutory language suggests that the Legislature intended to permit rating physicians and chiropractors to consider activities of daily living in making an impairment rating for spinal injuries.

Additionally, construing NRS 616C.110(2)(c) and NRS 616C.490(5) consistent with what reason and public policy suggest the Legislature intended, we conclude that it is appropriate that a person's ability to perform activities of daily living be utilized as one tool in the evaluation of an impairment rating for spinal injuries. Prohibiting consideration of activities of daily living—one of several tools used to make an impairment rating—is akin to prohibiting consideration of the patient's history or diagnostic tests. As Dr. Cocchiarella stated when she testified during the public workshop conducted by DIR, the AMA *Guides* require the consideration of the impact that a person's impairment has on his or her activities of daily living to produce a more reliable, accurate impairment rating. And without consideration of activities of daily living, people with the same type of spinal injury will be in the same category without differentiation between those whose activities of daily living are substantially impaired and those whose activities of daily living are not. The one- to three-percent differentiation, therefore, produces a more precise rating as to the extent of a person's impairment caused by his or her spinal injury—a re-

sult we conclude that reason and public policy suggest the Legislature intended.

We emphasize that permitting compensation for subjective complaints of pain without any objectively identifiable spinal injury, *i.e.*, chronic pain, clearly violates NRS 616C.110(2)(c)'s and NRS 616C.490(5)'s requirement that only ''physical impairment[s]'' be considered. However, we are persuaded that evaluating a person's ability to perform activities of daily living is not an improper consideration of subjective pain because, in order to provide the additional range of one to three percent for spinal injuries, rating physicians and chiropractors must first establish, through objective medical evidence, that a permanent physical impairment exists. Without the presence of an identifiable spinal injury, a person's subjective and continuing complaint of pain does not warrant an impairment rating.

Because we determine that DIR did not err by holding that NAC 616C.476 conformed to NRS 616C.110(2)(c) and NRS 616C.490(5), we conclude that the district court erred in granting the Association declaratory and injunctive relief. Accordingly, we reverse the order of the district court.

PARRAGUIRRE, C.J., and DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

ABIGAIL RICHLIN SCHWARTZ, APPELLANT, *v.* JONATHAN SCHWARTZ, AS THE PERSONAL REPRESENTATIVE OF MILTON I. SCHWARTZ, DECEASED, RESPONDENT.

No. 49313

March 4, 2010 225 P.3d 1273

Appeal from a district court divorce decree and post-decree orders denying a motion for a new trial and addressing property issues. Eighth Judicial District Court, Family Court Division, Clark County; T. Arthur Ritchie Jr., Judge.

Husband brought action against wife to dissolve marriage. Following bench trial, the district court entered divorce decree and ordered husband to pay support to wife. After husband and wife discussed reconciliation, wife filed a motion to alter or amend divorce decree and for a new trial, which was denied. Wife appealed. The supreme court, CHERRY, J., held that: (1) award to wife of $5,000 per month in temporary spousal support was appropriate, but (2) trial court should have taken husband's life expectancy into account when considering whether to award alimony in lump sum.

Affirmed in part, reversed in part, and remanded.

The Dickerson Law Group and *Robert P. Dickerson* and *Denise L. Gentile*, Las Vegas, for Appellant.

Sklar Williams LLP and *Frederic I. Berkley*, Las Vegas, for Respondent.

1. DIVORCE.
   The supreme court will not disturb a district court's disposition of property or an award of alimony on appeal without a showing of an abuse of discretion.
2. DIVORCE.
   The factors a district court should evaluate when making alimony determinations include: (1) the career of the wife before marriage, (2) the duration of the marriage, (3) the education level of the husband during the marriage, (4) the marketability of the wife, (5) the ability of the wife to support herself, (6) whether the wife stayed home to care for the children, and (7) what the wife was awarded besides alimony and child support.
3. DIVORCE.
   District court's award to wife of $5,000 per month for seven years in temporary spousal support in divorce proceeding was appropriate, where court considered financial condition of parties; nature and value of parties' respective property; contribution of each party to property held by them; duration of marriage; parties' income, earning capacity, age, health, and ability to labor; wife's post-divorce needs; and parties' station in life and gap in income.
4. DIVORCE.
   District court, when it determined whether to award wife's alimony in lump sum in divorce proceeding, should have taken husband's life expectancy into account; husband was 85 years old at time of trial whereas wife was 55 years old; and husband had end-stage kidney disease, was on dialysis three times a week, and was in poor health.
5. DIVORCE.
   When determining whether to award alimony in a lump sum in a divorce proceeding, the district court should take into consideration the life expectancy of the payor at the time of the determination, including the payor's medical condition and prospects for healthy living.

Before HARDESTY, CHERRY and SAITTA, JJ.[1]

OPINION

By the Court, CHERRY, J.:

This appeal concerns a divorce and the awarding of assets by the district court to appellant Abigail Schwartz based on several agree-

---

[1]THE HONORABLE MARK GIBBONS, Justice, voluntarily recused himself from participation in the decision of this matter.

ments entered into by Abigail and Milton Schwartz before Milton's death. The several agreements were entered into by Abigail and Milton before and during their marriage and include a reconciliation agreement entered into after a separation period.

In this opinion, we examine whether the district court abused its discretion in failing to award Abigail lump-sum alimony.

We conclude that the district court abused its discretion in failing to conduct a full and proper analysis of whether lump-sum alimony was appropriate in this case and hold that a district court should assess not only age disparity as set forth in *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990), but should also assess whether the life expectancy of the payor makes the award illusory. Accordingly, we reverse the district court's order regarding the award of alimony and remand for the district court to make a determination as to whether an award of lump-sum alimony was appropriate in this case.

FACTS AND PROCEDURAL HISTORY

Milton and Abigail met in May 1992. At the time of their meeting, Abigail was a registered nurse practicing in Las Vegas. Abigail stopped working as a registered nurse at Milton's request in order for the couple to be able to travel.

Milton and Abigail were married in 1993. At the time of their marriage, Milton was 71 years old and Abigail was 41 years old. Prior to their marriage, Abigail and Milton entered into a premarital agreement.

In December 1994, Milton filed for divorce against Abigail. On December 24, 1996, after 19 months of separation, Milton and Abigail reconciled and certain promises were made by both spouses, and these promises were memorialized in a reconciliation agreement.

On April 19, 2006, Milton filed a second complaint for divorce against Abigail. Abigail filed an answer and counterclaim against Milton seeking equitable relief and damages. After a two-day bench trial, the district court entered its findings of fact, conclusions of law, and divorce decree. In part, the district court ordered Milton to pay Abigail spousal support in the amount of $5,000 per month for a period of seven years.[2]

Shortly after the district court entered its divorce decree, Milton and Abigail had dinner together at a restaurant in Las Vegas. During this dinner, Milton told Abigail that he was unhappy that they had obtained a divorce. Milton also expressed to Abigail that he

---

[2]The alimony awarded Abigail by the district court terminated upon Milton's death.

was considering reconciling and that if he was to marry again, Abigail was the only wife for him. In the days following this dinner, Milton and Abigail spoke several more times about possibly reconciling and remarrying.

After the reconciliation dinner, Abigail filed a motion to alter and amend the district court's findings of fact, conclusions of law, and decree of divorce based on Milton's statements at the reconciliation dinner. Included in Abigail's motion was a motion for a new trial. The district court denied Abigail's motion to alter and amend its findings of fact, conclusions of law, and decree of divorce and for a new trial in its entirety.[3] This appeal follows.

DISCUSSION

Abigail argues that the district court abused its discretion in the amount of alimony it awarded to her and in failing to award her lump-sum alimony since Milton was in poor health at the time of the divorce proceedings and the alimony awarded her terminated at the time of Milton's death. Abigail contends that the district court erred in finding that this case was distinguishable from *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990), in which we reversed the district court's decision to award a monthly alimony payment that terminated upon the death of the payor and remanded with instructions to award permanent or lump-sum alimony. Abigail contends that, because of the age disparity between her and Milton, a lump-sum alimony award was required, and, thus, the district court abused its discretion in awarding alimony by not making such an award.

[Headnote 1]

We will not disturb a district court's disposition of property or an award of alimony on appeal without a showing of an abuse of discretion. *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996). ''This court's rationale for not substituting its own judgment for that of the district court, absent an abuse of discretion, is that the district court has a better opportunity to observe parties and evaluate the situation.'' *Id.* at 1359, 929 P.2d at 919 (citing *Winn v. Winn*, 86 Nev. 18, 20, 467 P.2d 601, 602 (1970)).

[Headnote 2]

NRS 125.150(1)(a) states that when granting a divorce, the district court may make an award of alimony, including a lump-sum award, ''as appears just and equitable.'' In making this determination, this court has stated that ''[m]uch depends on the particular facts of each individual case.'' *Forrest v. Forrest*, 99 Nev. 602, 606,

---

[3]After the divorce, Milton passed away and his son, respondent Jonathan Schwartz, represents Milton's interests in this matter.

668 P.2d 275, 278 (1983). This court has articulated seven factors to guide district courts in making alimony determinations. The factors a district court should evaluate include: (1) the career of the wife before marriage, (2) the duration of the marriage, (3) the education level of the husband during the marriage, (4) the marketability of the wife, (5) the ability of the wife to support herself, (6) whether the wife stayed home to care for the children, and (7) what the wife was awarded besides alimony and child support. *Sprenger v. Sprenger*, 110 Nev. 855, 859, 878 P.2d 284, 287 (1994). Additionally, ''it has long been the view of this court that we must presume in the case before us that proper regard was given by the trial court to a matter addressed to its consideration.'' *Buchanan v. Buchanan*, 90 Nev. 209, 216, 523 P.2d 1, 5 (1974).

[Headnote 3]

We conclude that the district court did not abuse its discretion in the amount of alimony it awarded to Abigail. The district court analyzed the factors set out in *Sprenger* in making its alimony award. In making its alimony award, the district court specifically looked at: (1) the financial condition of the parties; (2) the nature and value of the parties' respective property; (3) the contribution of each party to property held by them; (4) the duration of the marriage; (5) Milton's income, earning capacity, age, health, and ability to labor; (6) Abigail's income, earning capacity, age, health, and ability to labor; (7) Abigail's reasonable post-divorce needs; and (8) the parties' station in life and gap in income. The district court was in the best position to hear and decide the facts of this case, and we will not substitute our judgment for that of the district court on this issue.

[Headnote 4]

However, while the district court did not abuse its discretion in the amount of alimony, we conclude that the court failed to properly analyze whether the alimony should be awarded in a lump sum. The district court relied on our holding in *Daniel v. Baker*, 106 Nev. at 414, 794 P.2d at 346, in denying Abigail's request for lump-sum alimony. In *Daniel*, we held that the district court had abused its discretion in failing to award the wife lump-sum alimony because she had no earning potential and a longer life expectancy, while her husband had substantial wealth, was in poor health, and lump-sum alimony would not have depleted his assets. *Id.*

We must conclude that the district court abused its discretion in failing to do a full and proper analysis of whether lump-sum alimony was appropriate in this case, as the district court did not take Milton's health into account. Milton testified at trial, at which time he was 85 years old and Abigail was 55 years old, that he had end-stage kidney disease, was on dialysis three times a week, and

was in poor health. The district court should have taken Milton's poor health into account when making its determination of whether a lump-sum alimony award would have been proper in this case.

[Headnote 5]

We thus hold that a district court should assess not only age disparity as set forth in *Daniel*, but also whether the life expectancy of the payor will make a non-lump-sum alimony award illusory. Along with the analysis set out in *Daniel*, the age and health of the payor should be taken into consideration when undertaking an analysis of whether lump-sum alimony is appropriate. *Id.* Specifically, a district court should look at the life expectancy of the payor at the time of making the alimony determination and take into account the payor's medical condition and prospects for healthy living. This analysis will help avoid an illusory alimony award when a payor is known to be terminally ill or known to have low prospects for continued healthy living since it will allow the payee to continue to receive alimony in a manner that will assure they are supported past the payor's death. As such, we remand this case back to the district court to complete its analysis of whether a lump-sum alimony award is appropriate in this case, taking into account Milton's age, health, and life expectancy in relation to the length of the alimony award.

We therefore reverse the district court's order with regard to the award of alimony and remand for the district court to perform a complete analysis of whether lump-sum alimony is appropriate in this case, consistent with our holding. We have carefully reviewed all other issues raised on appeal and determine that they lack merit. Accordingly, we affirm all other aspects of the district court's decision.

HARDESTY and SAITTA, JJ., concur.

JACK SAYLOR, INDIVIDUALLY; AND BOULDER CAB, INC., DBA DELUXE TAXI CAB SERVICE, APPELLANTS, *v.* DR. KAREN ARCOTTA; DR. MUHAMMAD BHATTI; AND DR. NANCY ANNE DONAHOE, RESPONDENTS.

No. 50598

March 4, 2010 225 P.3d 1276

Appeal from a district court summary judgment, certified as final under NRCP 54(b), on a third-party complaint for indemnity and contribution in a tort action. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Taxicab driver and cab company brought third-party action against cab passenger's physicians for equitable indemnity and contribution arising out of passenger's death during surgery approximately two weeks after he was injured in taxicab accident. District court granted summary judgment in favor of physicians, and cab company and cab driver appealed. The supreme court, PARRAGUIRRE, C.J., held that: (1) in a matter of first impression, equitable indemnity claims that arise out of malpractice allegations are subject to four-year limitations period for actions on implied contracts; (2) four-year limitations period for equitable indemnity claims had not accrued or begun to run and, thus, were not time-barred; and (3) one-year limitations period for contribution claims had not accrued or begun to run.

Reversed and remanded.

Hutchison & Steffen, LLC, and *Michael K. Wall* and *James H. Randall*, Las Vegas, for Appellants.

Mayor Law Firm and *Sherman B. Mayor* and *Kim Horner*, Las Vegas, for Respondent Donahoe.

Horner Law Firm and *Cheryl D. Horner*, Las Vegas, for Respondent Bhatti.

Mandelbaum, Schwarz, Ellerton & McBride and *Robert C. McBride*, Las Vegas, for Respondent Arcotta.

1. APPEAL AND ERROR.
   Supreme court reviews issue of whether statute of limitations for medical malpractice actions applies to equitable indemnity and contribution claims de novo. NRS 41A.097(2).
2. INDEMNITY.
   Taxicab company's and cab driver's equitable indemnity claims against cab passenger's physicians that arose out of medical malpractice allegations associated with cab passenger's death during surgery approximately two weeks after he was injured in cab accident were subject to four-year limitations period for actions on implied contracts, rather than limitations period for medical malpractice. NRS 11.190(2)(c), 41A.097(2).
3. LIMITATION OF ACTIONS.
   Four-year limitations period for cab company's and cab driver's equitable indemnity claims against injured cab passenger's physicians had not accrued or begun to run, where cab company and cab driver had not yet suffered any actual loss. NRS 11.190(2)(c).
4. LIMITATION OF ACTIONS.
   One-year limitation period for contribution claims had not accrued or begun to run in cab driver's and cab company's contribution action against injured cab passenger's physicians arising out of passenger's death during surgery approximately two weeks after passenger was injured in cab accident; limitations period in a contribution action did not begin to

run until a judgment had been entered in an action against two or more tortfeasors for the same wrongful death, and no such judgment had been entered. NRS 17.285(2).

Before PARRAGUIRRE, C.J., DOUGLAS and PICKERING, JJ.

OPINION

By the Court, PARRAGUIRRE, C.J.:

In this appeal, we clarify the applicable limitations periods for equitable indemnity and contribution claims. In doing so, we conclude that claims for equitable indemnity are subject to the limitations period prescribed by NRS 11.190(2)(c), while claims for contribution are subject to the limitations period prescribed by NRS 17.285. Because no judgment has been entered in the case at hand, and thus the applicable statutes of limitations have not yet begun to run, we reverse the district court's summary judgment as to appellants' third-party complaint for indemnity and contribution.

FACTS AND PROCEDURAL HISTORY

This appeal arises from a taxicab accident injuring a cab passenger. Two weeks after the accident, the passenger was hospitalized for a heart attack and died during surgery. The passenger's heirs and successors in interest filed suit against, amongst others, appellants Jack Saylor, the taxicab driver, and the cab company, Deluxe Taxi Cab Service. Through discovery, appellants learned that the passenger's death may have been caused by medical negligence and were granted leave to file a third-party complaint against the passenger's treating physicians, respondents Dr. Karen Arcotta, Dr. Muhammad Bhatti, and Dr. Nancy Donahoe, for equitable indemnity and contribution.[1] Respondents moved the district court for summary judgment, arguing that appellants' claims were time-barred by the statute of limitations for medical malpractice actions, NRS 41A.097. The district court agreed that appellants' claims against respondents were time-barred, granted respondents' motion for summary judgment, and dismissed appellants' third-party complaint.[2] The district court ultimately certified

---

[1]While appellants use the term ''implied indemnity,'' our caselaw largely refers to noncontractual indemnity as ''equitable indemnity.'' *See Medallion Dev. v. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997), *superseded by statute on other grounds as stated in Doctors Company v. Vincent*, 120 Nev. 644, 654, 98 P.3d 681, 688 (2004).

[2]Respondents also moved the district court to dismiss the third-party complaint on the grounds that the contribution claim was premature because appellants had not yet paid on any judgment or settlement, and that the indemnity claim was improper because appellants had no legal relation to respon-

its summary judgment as final under NRCP 54(b).[3] This appeal followed.

DISCUSSION

[Headnote 1]

On appeal, appellants contend that summary judgment was improper because NRS 41A.097(2)'s limitations period does not apply to equitable indemnity and contribution claims. We review this issue de novo. *See State, Div. of Insurance v. State Farm*, 116 Nev. 290, 293, 995 P.2d 482, 484 (2000) (reviewing questions of law de novo); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (reviewing a district court's grant of summary judgment de novo).

Equitable indemnity statute of limitations

[Headnote 2]

Appellants argue that a cause of action for equitable indemnity is separate and distinct from the underlying cause of action and carries its own limitations period. We agree.

Although our caselaw has not addressed the issue, it is generally recognized that equitable indemnity claims are not governed by the limitations period applicable to the underlying tort. *See, e.g.*, *Reggio v. E.T.I.*, 15 So. 3d 951, 955 (La. 2008) (''An action for indemnity is a separate substantive cause of action, arising at a different time, independent of the underlying tort, with its own prescriptive period.''); Maurice T. Brunner, Annotation, *What Statute of Limitations Covers Action for Indemnity*, 57 A.L.R.3d 833 § 2(a) (1974) (''The cause of action for indemnity is wholly distinct from the transaction or situation which gave rise to the right to indemnity.''). In line with this view, we hold that equitable indemnity claims that arise out of medical malpractice allegations are not subject to NRS 41A.097(2)'s limitations period for medical malpractice claims, but are instead subject to NRS 11.190(2)(c)'s limitations period for actions on implied contracts.

NRS 11.190(2)(c) prescribes the limitations period for actions on implied contracts, providing that ''action[s] upon a contract, obligation or liability not founded upon an instrument in writing'' must be brought within four years. Because claims for equitable indemnity are based upon a theory of implied contract, we conclude

---

dents. As a result of granting respondents' summary judgment motion, respondents' motion to dismiss was rendered moot. Because we reverse the district court's grant of summary judgment, respondents' motion to dismiss should be entertained on remand.

[3]Judge Stewart Bell entered the order granting summary judgment from which this appeal is taken, and Judge Elissa Cadish entered the order certifying the summary judgment as final pursuant to NRCP 54(b).

that NRS 11.190(2)(c) provides the applicable statute of limitations for equitable indemnity claims. *See Mack Trucks, Inc. v. Bendix-Westinghouse Auto. A.B. Co.*, 372 F.2d 18, 21 (3d Cir. 1966); *see also* 41 Am. Jur. 2d *Indemnity* § 38 (2005) (''A common-law indemnity action is based on a theory of quasi-contract or contract implied in law and is generally held to be governed by the statute of limitations applicable to actions on implied contracts.''); *accord* Brunner, *supra*, § 3.

[Headnote 3]

Therefore, because appellants have not suffered any actual loss, and thus the statute of limitations has not yet begun to run, we conclude that the district court erred in dismissing appellants' equitable indemnity claim as time-barred.[4] *See Aetna Casualty & Surety v. Aztec Plumbing*, 106 Nev. 474, 476, 796 P.2d 227, 229 (1990) (the limitations period for equitable indemnity claims does not begin to run until the indemnitee suffers actual loss by paying a settlement or underlying judgment); *accord Rodriguez v. Primadonna Company*, 125 Nev. 578, 589-90, 216 P.3d 793, 801 (2009).

Contribution statute of limitations

[Headnote 4]

In Nevada, a claim for contribution is preserved by statute—NRS 17.225—and carries a fixed limitations period under NRS 17.285. Pursuant to NRS 17.285(2), a contribution claim arises ''[w]here a judgment has been entered in an action against two or more tortfeasors for the same . . . wrongful death.'' *See also Aztec Plumbing*, 106 Nev. at 476, 796 P.2d at 229. The contribution claim must be filed ''within 1 year after the judgment has become final by lapse of time for appeal or after appellate review.'' NRS 17.285(3). Thus, once a contribution claim arises, it is subject to a one-year statute of limitations.

Here, because NRS 17.285 specifically sets forth the applicable statute of limitations for contribution claims, and because that statute of limitations period has not yet begun to run in this case, the district court erred in concluding that appellants' contribution claim was time-barred under NRS 41A.097(2)'s medical malpractice statute of limitations.

Based on the above, we conclude that the district court erred in granting summary judgment and dismissing appellants' third-party complaint for equitable indemnity and contribution as time-barred. Accordingly, we reverse the district court's grant of sum-

---

[4]In reaching this conclusion, we do not pass judgment on the validity of appellants' claim for equitable indemnity.

mary judgment and remand for further proceedings consistent with this opinion.

DOUGLAS and PICKERING, JJ., concur.

COAST TO COAST DEMOLITION AND CRUSHING, INC., A NEVADA CORPORATION; JIMI TELFORD, AN INDIVIDUAL; AND NANCY ELISE COMBS, AN INDIVIDUAL, APPELLANTS, *v.* REAL EQUITY PURSUIT, LLC, RESPONDENT.

No. 50922

March 4, 2010 226 P.3d 605

Appeal from a confession of judgment entered in district court. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Lender filed borrowers' confession of judgment in the district court. Borrowers appealed. The supreme court, PICKERING, J., held that: (1) confession was enforceable, although it contained notarial defects; and (2) confession adequately stated facts out of which it arose and sum that was due and, thus, was enforceable.

Affirmed.

Gordon & Silver, Ltd., and *Eric R. Olsen* and *Karen L. Hanks*, Las Vegas, for Appellants.

Law Office of Hayes & Welsh and *Garry L. Hayes* and *Megan K. Mayry McHenry*, Henderson, for Respondent.

1. APPEAL AND ERROR.
   Supreme court normally will not decide an issue not litigated in the trial court.
2. JUDGMENT.
   Confession of judgment by commercial borrowers was enforceable, although it contained notarial defects in that notary's name, instead of borrowers' names, appeared in acknowledgment, and notarial certificates for all loan documents did not include oath or affirmation of truth of statements in documents; borrowers' signatures on loan agreement, promissory note, and security agreement, which confession incorporated by reference, were properly notarized, borrowers and lender were equally sophisticated, and statute that established requirements for confession of judgment supported substantial-compliance analysis. NRS 17.090, 17.100, 17.110, 240.1655(2)(e).
3. CONTRACTS.
   Multiple writings signed at the same time, addressing the same subject, and cross-referencing one another may be taken to comprise a single agreement.

4. ACKNOWLEDGMENT.
   Acknowledging a document is not the same thing as verifying it.
5. JUDGMENT.
   To comply with verification requirement in statute that established requirements for confession of judgment, lender was not required to comply with verification requirements for pleadings; requirements imposed on pleadings used to commence an action do not apply to confessions, which are the antithesis of pleadings, since they do not involve actions. NRS 15.010, 17.100.
6. JUDGMENT.
   When third party challenges confession of judgment, verification-by-oath requirement in statute that establishes requirements for confession of judgment protects against collusive or fraudulent preferences; to permit judgments by confession to stand where they were entered on unsworn statements would permit collusive judgments by confession without an effective sanction in the form of prosecution for perjury against the defrauding judgment debtor. NRS 17.100.
7. JUDGMENT.
   A debtor cannot avoid an otherwise valid signed confession of judgment based on his failure to verify the statements he subscribed.
8. JUDGMENT.
   A debtor himself cannot impeach a judgment entered upon a statement which he signed but which he did not make under oath.
9. JUDGMENT.
   If confession of judgment is in fact signed by judgment debtor as an intended confession, debtor is estopped from challenging enforceability of his signed but unverified confession.
10. JUDGMENT.
    Confession of judgment by borrowers adequately stated facts out of which it arose and sum that was due and, thus, was enforceable; loan documents recited that debt was truly owed, were signed by borrowers, initialed on each page, and authenticated. NRS 17.100(2).
11. APPEAL AND ERROR.
    Motion to vacate or separate proceeding in trial court was required in order for supreme court to consider argument that statute prohibited enforcement of borrowers' confession of judgment and that confession was unconscionable; with only bare confession and related transactional documents before supreme court, fact-bound arguments could not prevail. NRS 675.350(1).
12. APPEAL AND ERROR.
    To challenge a confessed judgment based on facts outside of the judgment documents themselves requires a motion to vacate or separate proceeding in the trial court, so the facts may be developed.

Before PARRAGUIRRE, C.J., DOUGLAS and PICKERING, JJ.

OPINION

By the Court, PICKERING, J.:

This is an appeal from a judgment entered by confession. The appellants, who are the judgment debtors, acknowledged the debt

but challenge the confession on statutory grounds and as unconscionable. We affirm.

I.

Respondent Real Equity Pursuit, LLC, loaned appellants Jimi Telford, Nancy Combs, and Coast to Coast Demolition and Crushing, Inc. (collectively, Coast to Coast), $3,000,000. The parties documented the transaction in a loan agreement, a promissory note and security agreement, and the confession of judgment underlying this appeal. The transactional documents cross-reference each other and were signed by Telford and Combs, ''as individual[s] and on behalf of Coast to Coast.'' Their signatures were notarized but the notary made two mistakes. On the confession of judgment, she printed her name instead of the signers' names in the blank space over her notary stamp. She also used document-acknowledgment language, verifying the signer's identity and signature, instead of jurat language, swearing to the truth of the statements in the documents.

The loan documents set Coast to Coast's payment terms and authorized Real Equity to file the confessed judgment in the event of default. The confession of judgment reprises the terms of the transaction, including the amount of the debt and the payment terms. Referring to Coast to Coast as the ''Defendant,'' it states:

> Defendant . . . confesses that this debt is justly due . . . . Defendant further confesses that he has no substantive or procedural defense to this Confession and that it was executed under his own volition and not under any duress or coercion or anything other than his free will, both in his individual capacity and capacity as officer for the company. Defendant also confesses that he has had time to seek counsel of his own choosing to review this confession of judgment and has no defenses whether now known or unknown.

The confession details what will constitute a default and states:

> In the event that Defendant does not cure said default in the payment arrangements, Defendant hereby confesses Judgment in favor of Plaintiffs for the principal then owing, plus accrued interest.

The loan and security agreements conclude with ''in witness whereof'' language above the signatures, while the note recites that ''our signature(s) below indicate my/our understanding & acceptance of all of the above terms.''

Coast to Coast defaulted. When it did, Real Equity filed the confession of judgment, which the district court clerk entered. This appeal timely followed.

[Headnote 1]

Before filing the notice of appeal, Coast to Coast filed a motion to vacate the judgment, which the district court denied. Coast to Coast does not appeal—indeed, it affirmatively disclaims any intention of appealing—the order denying the motion to vacate, and it did not include any papers relating to the motion to vacate in its appendix. The disclaimer is surprising, given that this court normally will not decide an issue not litigated in the trial court. *Durango Fire Protection v. Troncoso*, 120 Nev. 658, 661, 98 P.3d 691, 693 (2004). Without the motion to vacate, Coast to Coast is left with a facial challenge to the judgment being void as a matter of law, an uphill climb at best.[1] *Cf. Majestic, Inc. v. Berry*, 593 N.W.2d 251, 257-58 (Minn. Ct. App. 1999) (rejecting argument that a confessed judgment was void as a matter of law when the challenge was not made in the trial court, providing an insufficient record on appeal).

II.

[Headnote 2]

Coast to Coast mounts two facial challenges to the confession's validity. First, Coast to Coast objects to the confession because, though signed and notarized, its recitals weren't ''verified by . . . oath.'' NRS 17.100. Second, it faults the confession for not ''stat[ing] concisely the facts out of which it arose.'' NRS 17.100(2). Neither challenge invalidates the judgment as a matter of law. Coast to Coast's remaining challenges raise fact issues and are defeated by its election to appeal directly without developing them by motion or plenary proceeding in the district court.

A.

Some background is helpful to place Coast to Coast's challenges in context. Nevada confession of judgment practice is governed by NRS 17.090 through NRS 17.110. These statutes have been in existence, with different code numbers but in substantially the same form, since 1869. *See, e.g.*, 1 Nev. Compiled Laws § 1421 (1873); Civil Practice Act of 1911 § 308, *reprinted in*

---

[1]Since Real Equity does not challenge Coast to Coast's right to appeal from a confession of judgment, we do not reach the issue of whether the confession obviates appellate review absent challenge in the district court. *But see* 46 Am. Jur. 2d *Judgments* § 204 (2006) (noting that ''[a] confession of judgment is substantially an acknowledgment that a debt is justly due and cuts off all defenses and right of appeal'' (footnotes omitted)); 4 C.J.S. *Appeal and Error* § 282 (2007) (''Generally, because of the defendant's consent, a judgment by confession is considered as waiving or releasing errors, and may not be appealed,'' except when ''the legality of the right to enter the judgment is involved.'').

Nev. Rev. Laws § 5250 (1912); Nev. Compiled Laws § 8806 (1929). NRS 17.090 provides that ''[a] judgment by confession may be entered without action, either for money due or to become due . . . in the manner prescribed by this section and NRS 17.100 and 17.110.'' NRS 17.100 reads in pertinent part:

> A statement in writing shall be made, signed by the defendant and *verified by his oath*, to the following effect:
>
> 1. It shall authorize the entry of judgment for a specified sum.
>
> 2. If it be money due, or to become due, *it shall state concisely the facts out of which it arose*, and shall show that the sum confessed therefor is justly due, or to become due.

(Emphases added.) NRS 17.110 addresses entry of the confessed judgment on the clerk's judgment roll. A facial challenge to the constitutionality of Nevada's confession of judgment statutes was repelled in *Tunheim v. Bowman*, 366 F. Supp. 1392 (D. Nev. 1973).

[Headnote 3]

The confession of judgment in this case was authenticated by the notarized signatures of Coast to Coast's principals on the confession and the related loan documents. Despite the technical defect in the notarial certificate on the confession (the notary's name instead of the signers' appears in the acknowledgment), the signatures on the other loan documents, which the confession incorporates by reference, were properly notarized. Multiple writings signed at the same time, addressing the same subject, and cross-referencing one another may be taken to comprise a single agreement. *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 292, 662 P.2d 610, 615 (1983). The failure of one of those documents to comply with statutory formalities, when the others do, does not destroy the agreement's enforceability. *Bowker v. Goodwin*, 7 Nev. 135, 139 (1871). Since the writings comprise a single transaction, in the individual circumstances of this appeal we deem the notarizations adequate acknowledgment of the confession and the related loan documents. *See Torrealba v. Kesmetis*, 124 Nev. 95, 106-07, 178 P.3d 716, 724-25 (2008) (rejecting rule that would require strict compliance with notarial requirements on an acknowledgment so long as, in the ''individual circumstances'' of the case, ''honoring the instrument would not improperly benefit the notary or any party to the instrument and would not create harm''); *Johnson v. Badger M. & M. Co.*, 13 Nev. 351, 353 (1878) (''The form of the certificate is, in several respects, irregular. The law, however, does not require that the exact form of the certificate given in the statute shall be followed. All that is necessary is a substantial compliance with the statute.'').

[Headnote 4]

But acknowledging a document is not the same thing as verifying it. An ''acknowledgment'' is ''a declaration by a person that he has executed an instrument for the purposes stated therein and, if the instrument is executed in a representative capacity, that he signed the instrument with proper authority and executed it as the act of the person or entity represented and identified therein.'' NRS 240.002. Although no longer separately addressed in the notary statutes, ''verification'' normally signifies that a document has been ''sw[orn]'' or ''affirm[ed],'' which a ''jurat'' establishes. NRS 240.1655(2)(e). A ''jurat'' is ''a declaration by a notarial officer that the signer of a document signed the document in the presence of the notarial officer and swore to or affirmed that the statements in the document are true.'' NRS 240.0035.[2] The notarial certificates on the Coast to Coast documents do not include the words ''signed and sworn to (or affirmed) before me,'' which are needed for a jurat. NRS 240.167.

[Headnote 5]

NRS 17.100 does not specify the form of verification required to validate a confession. Coast to Coast argues that, to comply with the verification requirement in NRS 17.100, the confession must comply with the form of verification specified in NRS 15.010.[3] We disagree. NRS 15.010 governs verification of the truth of averments made in ''pleadings,'' which are the civil filings—complaint, answer, counterclaim—by which an ''action'' is commenced and its issues framed. NRCP 2, 3, and 7(a). NRS 17.090, by contrast, states that ''[a] judgment by confession may

---

[2]The 2003 amendments to NRS Chapter 240 eliminated most of the references to ''verification'' and replaced them with ''jurat,'' which is defined in NRS 240.0035. 2003 Nev. Stat., ch. 110, §§ 3, 5, at 606 (amending former NRS 240.004(3), which addressed a notary ''taking a verification upon oath or affirmation''). No substantive change to the meaning of the statutes was intended; rather, the purpose was to streamline and simplify the notarization statutes. Hearing on A.B. 87 Before the Assembly Governmental Affairs Comm., 72d Leg. (Nev., April 28, 2003).

[3]NRS 15.010 states, in relevant part:

> 1. In all cases of the verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.
>
> . . . .
>
> 5. The affidavit may be in substantially the following form and need not be subscribed before a notary public:
>
> Under penalties of perjury, the undersigned declares that he is the ..... (plaintiff, defendant) named in the foregoing ..... (complaint, answer) and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes it to be true.

be entered *without action*,'' (emphasis added), and this is indeed the point of a confession of judgment: that judgment is obtained without action. The requirements NRS 15.010 imposes on pleadings used to commence an action do not apply to confessions, which are the antithesis of pleadings, since they do not involve actions. If anything, the highly specific requirements that NRS 15.010 imposes on verified pleadings, when contrasted to NRS 17.100's generality as to verified confessions of judgment, supports a substantial-compliance analysis in the context of NRS 17.100. *See Leven v. Frey*, 123 Nev. 399, 407-08, 168 P.3d 712, 717-18 (2007) (citing 3 Norman J. Singer, *Statutes and Statutory Construction* § 57:19, at 58 (6th ed. 2001)) (a statute's timing requirements must be strictly complied with ''whereas substantial compliance may be sufficient for 'form and content' requirements,'' especially where the statute does not specify how those form and content requirements are to be met); *Humboldt M. & M. Co. v. Terry*, 11 Nev. 237, 241 (1876) (''The sufficiency of the writing claimed to be a judgment should always be tested by its substance rather than its form.'').

[Headnote 6]

According to *Black's Law Dictionary*, to confess means ''[t]o admit (an allegation) as true.'' *Black's Law Dictionary* 316 (8th ed. 2004). Through its principals, Telford and Combs, Coast to Coast ''confess[ed]'' to each of NRS 17.100's required averments: that Real Equity loaned it $3,000,000; that it was required to make monthly payments on the loan beginning on a certain date; that the loan must be paid in full by a certain date; that failure to make those payments would constitute default; and that, in the event of default, Real Equity could file the confessed judgment for the principal then owed on the loan. If the truth of these acknowledgments were contested—as it would be if a third-party creditor protested them or even, arguably, if Coast to Coast presented extrinsic evidence of fraud, mistake, or overreaching by Real Equity or otherwise contested the debt its principals acknowledged—the absence of an oath or jurat, subjecting the signers to the penalty of perjury, would be significant. *See State v. Pray*, 64 Nev. 179, 192-93, 179 P.2d 449, 455 (1947) (oath required for perjury prosecution). In the third-party context, the ''verification by . . . oath'' requirement in NRS 17.100 protects against collusive or fraudulent preferences. *See McDaniel v. Sangenino*, 412 N.Y.S.2d 400, 402-03 (App. Div. 1979). From the limited record presented here, however, it appears that the confession was used by ''sophisticated parties, negotiating a complex loan.'' *Capital v. Tri-National Development Corp.*, 127 Cal. Rptr. 2d 360, 365 (Ct. App. 2002). As between equally sophisticated parties to a commercial transaction, the acknowledgment and lack of substantive or evidence-

based challenge to the bona fides of the transaction defeats the purely facial challenge Coast to Coast makes.[4]

[Headnotes 7-9]

We recognize that, ''[i]n general, the law does not favor confession-of-judgment provisions'' and that they are therefore ''viewed circumspectly.'' 46 Am. Jur. 2d *Judgments* § 206 (2006). However, upholding the confession against Coast to Coast's facial challenge comports with the historically accepted rule that, without more, a debtor cannot avoid an otherwise valid signed confession based on his failure to verify the statements he subscribed. *Pulley v. Pulley*, 121 S.E.2d 876, 880-81 (N.C. 1961); *Los Angeles Adjustment Bureau, Inc. v. Noonan*, 5 Cal. Rptr. 445, 447-48 (Ct. App. 1960).[5] These cases distinguish between the third- and first-party contexts. In the context of a challenge by a third-party creditor, ''[t]o permit judgments by confession to stand where they were entered on unsworn statements would permit collusive judgments by confession without an effective sanction in the form of prosecution for perjury against the defrauding judgment debtor.'' *McDaniel*, 412 N.Y.S.2d at 402-03. In the first-party commercial or nonconsumer context, however, it is the rule that ''the defendant debtor himself cannot impeach a judgment entered upon a statement which he signed but which he did not make under oath.'' *Id.* at 403; *accord Pulley*, 121 S.E.2d at 880-81; *Los Angeles Adjustment Bureau*, 5 Cal. Rptr. at 447-48; *Mullin v. Bellis*, 90 N.Y.S.2d 27, 28 (N.Y. City Ct. 1949). If ''the confession was in fact signed by the [judgment debtor/defendant] as an intended confession,'' *Los Angeles Adjustment Bureau*, 5 Cal. Rptr. at 448, the debtor is estopped from challenging the enforceability of his signed but unverified confession. *Pulley*, 121 S.E.2d at 882 (''We place our decision squarely upon the ground that defendant, under all the facts here, is estopped to question the validity of his own confessed judgment.''); *Mullin*, 90 N.Y.S.2d at 28 (''a defendant cannot impeach a judgment which is based upon his signed statement even

---

[4]Confessions of judgment in the consumer loan or adhesion contract setting present entirely different concerns and in fact are not permitted in Nevada. NRS 604A.440(4)(b); *see* NRS 675.350(1).

[5]The issue is context-specific, as *Ataka America v. Washington West Trade Corp.*, 136 Cal. Rptr. 71, 72 (Ct. App. 1977), illustrates. In *Ataka*, the court upheld an order vacating a confession of judgment at the behest of a debtor based in part on the grounds that the confession, while signed, was not verified. The *Ataka* court distinguished *Noonan* on the grounds that the debtor before it had introduced evidence disputing the debt and, further, tending to show that his precarious financial circumstances made it likely that reversing the order vacating the confessed judgment would disadvantage third-party creditors. Neither argument has been or could be made in this case, which is a direct appeal from the confession of judgment itself, with no other documents of record to establish facts akin to those in *Ataka*.

though it be unverified or unacknowledged''); *Johnson v. Alvis*, 165 S.E. 489, 490 (Va. 1932) (''A defendant confessing judgment is estopped, in the absence of fraud, to question its validity on account of irregularities to which he did not object, or to dispute any facts set forth in the confession[.]'').

B.

[Headnote 10]

Turning to Coast to Coast's next challenge, the confession amply satisfies NRS 17.100(2), which requires that it ''state concisely the facts out of which it arose, and shall show that the sum confessed therefor is justly due, or to become due.'' The confession and its related documents describe a $3,000,000 loan, with specific repayment terms and default conditions, in which Coast to Coast agrees to entry of judgment in the event of default. The documents recite that the debt is truly owed, and they are signed by Coast to Coast, initialed on each page, and authenticated. The ''statement'' requirement in NRS 17.100 does not require more.

[Headnotes 11, 12]

Equally unavailing are Coast to Coast's arguments that Real Equity violated NRS 675.350(1) in taking a confession and that the agreement was unconscionable. Both arguments depend on facts this appeal record does not contain. To challenge a confessed judgment based on facts outside of the judgment documents themselves requires a motion to vacate or separate proceeding in the trial court, so the facts may be developed. *L.R. Dean, Inc. v. Inter. Energy Resources*, 623 N.Y.S.2d 624, 625-26 (App. Div. 1995); *Barnes v. Hilton*, 257 P.2d 98, 98-100 (Cal. Ct. App. 1953). With only the bare confession and related transactional documents before the court, these fact-bound arguments cannot prevail.

Accordingly, we affirm.

PARRAGUIRRE, C.J., and DOUGLAS, J., concur.

AARON R. CROMER AND FELICIA CROMER, APPELLANTS,
v. WILLIAM GIBSON WILSON, RESPONDENT.

No. 50767

AARON R. CROMER, APPELLANT, *v.*
WILLIAM GIBSON WILSON, RESPONDENT.

No. 51365

March 11, 2010 225 P.3d 788

Consolidated appeals from a district court judgment on a jury verdict in a torts action and a post-judgment order denying attorney fees and prejudgment interest. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Passenger brought action against driver of vehicle arising from single-vehicle accident in which passenger was injured. The district court entered judgment on jury verdict in favor of passenger and denied passenger attorney fees and prejudgment interest. Passenger appealed. The supreme court, DOUGLAS, J., held that statute mandating that conviction of crime injuring victim establishes civil liability allows comparative negligence defense.

Affirmed.

Christensen Law Offices, LLC, and *David F. Sampson* and *Carl J. Christensen*, Las Vegas, for Appellants.

Lewis Brisbois Bisgaard & Smith, LLP, and *Mark J. Brown* and *Josh C. Aicklen*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   A district court's order denying summary judgment is an interlocutory decision and is not independently appealable. NRCP 56(c).
2. APPEAL AND ERROR.
   Where a party properly raises the issue of denial of summary judgment on appeal from the final judgment, supreme court will review the decision de novo. NRCP 56(c).
3. JUDGMENT.
   Summary judgment is appropriate when the pleadings and other evidence establish that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law. NRCP 56(c).
4. APPEAL AND ERROR.
   The construction of statutes is a question of law, which supreme court reviews de novo.
5. STATUTES.
   In interpreting statutes, the primary consideration is the Legislature's intent.

6. STATUTES.
   When a statute is clear and unambiguous, supreme court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction.
7. STATUTES.
   If a statute is susceptible of another reasonable interpretation, supreme court must not give the statute a meaning that will nullify its operation, and court looks to policy and reason for guidance.
8. STATUTES.
   Supreme court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized.
9. NEGLIGENCE.
   Statutory defense of comparative negligence was not abrogated by statute that provided that if an offender had been convicted of crime that injured victim, conviction was conclusive evidence of all facts necessary to impose civil liability for the injury; statute was silent about whether defendant could argue comparative negligence pursuant to statutory defense, statute only established liability, but not damages, and thus comparative negligence was still available as defense to damages. NRS 41.133, 41.141.

Before PARRAGUIRRE, C.J., DOUGLAS and PICKERING, JJ.

OPINION

By the Court, DOUGLAS, J.:

Appellant Aaron Cromer received a jury verdict of $4,530,785.50 as a result of injuries he sustained in a car crash caused by respondent William Wilson. On appeal, Aaron and his wife Felicia Cromer raise several issues, only one of which merits detailed consideration. The Cromers contend that the district court should have granted summary judgment on the issue of liability because NRS 41.133 allows a judgment of conviction to conclusively establish civil liability for a crime and should have precluded Wilson from arguing comparative fault pursuant to NRS 41.141.

We conclude that the conclusive presumption of NRS 41.133 applies to liability but does not abrogate the law regarding comparative negligence or damages. The district court should have granted the summary judgment motion as to liability and held a trial as to damages only; at such a trial, the defense could have introduced evidence of comparative fault, if any, to reduce the damages award. In this case, the district court allowed the trial to proceed as to liability and damages. The jury found Wilson liable and awarded damages. Although the district court utilized the incorrect procedure, the appropriate outcome was reached. Therefore, we affirm

the judgment of the district court. *See, e.g.*, *Sanchez v. Wal-Mart Stores*, 125 Nev. 818, 824 n.2, 221 P.3d 1276, 1280 n.2 (2009) (noting that this court will affirm a district court's order if the district court reached the correct result, even for the wrong reason).

FACTS AND PROCEDURAL HISTORY

This case arises from a single-car accident that occurred on July 21, 2002. Wilson was driving while intoxicated and speeding, causing him to veer off the road. The vehicle overturned and rolled multiple times. Aaron, who was a passenger in Wilson's vehicle, suffered two spinal vertebrae fractures, four broken ribs, a broken wrist, and a broken collarbone. As a result of his injuries, Aaron was rendered an incomplete quadriplegic with severe disability to his hands, arms, and legs.

Wilson's blood alcohol concentration was 0.31 percent and he also had cocaine metabolite in his system at the time of the crash. He was subsequently convicted of felony DUI and felony reckless driving.

On May 5, 2003, the Cromers filed a complaint against Wilson alleging negligence. Wilson's answer asserted an affirmative defense of comparative negligence.

Prior to trial, the Cromers filed a motion for summary judgment on the issue of liability, arguing that the application of NRS 41.133 conclusively established Wilson's liability because he was convicted of the felony that resulted in Aaron's injury. The district court concluded that, notwithstanding NRS 41.133, Wilson was allowed to argue comparative negligence pursuant to NRS 41.141. Thus, the district court concluded that the Cromers were not entitled to judgment as a matter of law. The case proceeded to trial on both liability and damages.

The jury was allowed to consider Wilson's comparative-negligence defense in its determination of liability, and found Aaron to be 25 percent at fault and Wilson to be 75 percent at fault. The jury returned a verdict in favor of Aaron and against Wilson and awarded damages totaling $4,530,785.50.

DISCUSSION

The Cromers and Wilson agree that NRS 41.133 applies to this situation because Wilson was convicted of the felony that resulted in Aaron's injury. The Cromers argue that NRS 41.133 precludes Wilson from arguing comparative negligence because the plain language of the statute requires the imposition of liability if an offender has been convicted of the crime that resulted in the injury to the victim. Accordingly, the Cromers argue that the district court was required to grant summary judgment in Aaron's favor

as to the issue of Wilson's liability.[1] Wilson argues that the district court properly denied the Cromers' motion for summary judgment and was correct in allowing the jury to consider comparative negligence.

We conclude that the language of NRS 41.133 establishes a conclusive presumption of liability when an offender has been convicted of the crime that resulted in the injury to the victim. However, NRS 41.133 does not abrogate the law regarding comparative negligence or damages. Therefore, while NRS 41.133 establishes a conclusive presumption of liability, a defendant may argue comparative negligence pursuant to NRS 41.141 to reduce an award of damages at a trial as to damages only.

Standard of review

[Headnotes 1-3]

A district court's order denying summary judgment is an interlocutory decision and is not independently appealable. *GES, Inc. v. Corbitt*, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001). However, where a party properly raises the issue on appeal from the final judgment, this court will review the decision de novo. *Id.*; *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when the pleadings and other evidence establish that ''no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.' '' *Wood*, 121 Nev. at 729, 121 P.3d at 1029 (alteration in original) (quoting NRCP 56(c)).

[Headnotes 4-8]

The construction of statutes is a question of law, which we review de novo. *State, Dep't of Mtr. Vehicles v. Lovett*, 110 Nev. 473, 476, 874 P.2d 1247, 1249 (1994). In interpreting statutes, the primary consideration is the Legislature's intent. *Cleghorn v. Hess*, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993). When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of construction. *Seput v. Lacayo*, 122 Nev. 499, 502, 134 P.3d 733, 735 (2006). If, however, a statute is susceptible of another reasonable interpretation, we must not give the statute a meaning that will nul-

---

[1]Because NRS 41.133 only applies to the victim of the crime, it is not applicable to Felicia's claims. Therefore, this discussion will only address NRS 41.133 as it applies to Aaron's claims.

While the district court should have granted summary judgment as to liability for Aaron's injuries, in such a situation Felicia's claims arising from Aaron's injuries must still be litigated and liability for those claims must be submitted to the jury. Therefore, the district court acted properly with respect to Felicia's claims.

lify its operation, and we look to policy and reason for guidance. *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 714 (2007). Further, this court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized. *Id.*; *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005).

Application of NRS 41.133 and NRS 41.141

[Headnote 9]

NRS 41.133 provides that ''[i]f an offender has been convicted of the crime which resulted in the injury to the victim, the judgment of conviction is conclusive evidence of all facts necessary to impose civil liability for the injury.'' NRS 41.133 ''mandates that conviction of a crime resulting in injury to the victim is conclusive evidence of civil liability for the injury.'' *Langon v. Matamoros*, 121 Nev. 142, 143, 111 P.3d 1077, 1077 (2005).

In *Langon*, the court concluded that NRS 41.133 applies to convictions for malum in se offenses. *Id.* at 144-45, 111 P.3d at 1078. The court distinguished malum in se offenses, which ''legislators clearly intended NRS 41.133 to include,'' from malum prohibitum offenses, which the court concluded were not included in NRS 41.133.[2] *Id.* at 145, 111 P.3d at 1078. The court also discussed the legislative history of NRS 41.133, noting that when the bill was approved, the companion provision became NRS 41.135, which enumerates the ''malum in se offenses that legislators clearly intended NRS 41.133 to include.'' *Id.* NRS 41.135 clearly enumerates convictions for felonies. Therefore, we conclude that NRS 41.133 was clearly intended to apply to felony convictions, which includes Wilson's convictions for felony DUI and felony reckless driving.

In considering the application of NRS 41.133, the *Langon* court noted ''the scope of NRS 41.133 is inherently unclear, particularly in relation with other statutory measures governing tort liability.'' *Id.* at 144, 111 P.3d at 1078. We now address the potential conflict between NRS 41.133 and NRS 41.141 that the *Langon* court identified.

NRS 41.133 is silent about whether the defendant may argue comparative negligence pursuant to NRS 41.141 in situations where ''the judgment of conviction is conclusive evidence of all facts necessary to impose civil liability.'' Since NRS 41.133 does not exclusively limit defenses or abrogate statutorily created defenses such as NRS 41.141, it seems that the affirmative defense

---

[2]A malum in se offense is ''a crime or an act that is inherently immoral, such as murder, arson, or rape.'' *Black's Law Dictionary* 1045 (9th ed. 2009). A malum prohibitum offense is ''an act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.'' *Id.*

of comparative negligence should be permitted to refute liability in the instant case. However, such an application might work to negate the intended effect of NRS 41.133. Thus, in construing these statutes, we attempt to give effect to both NRS 41.133 and NRS 41.141.

To give effect to both statutes, we must first clarify the court's statements in *Langon*. In *Langon*, the court concluded that the application of NRS 41.133 to misdemeanor traffic violations ''would render the comparative negligence scheme of NRS 41.141 meaningless.'' *Id.* at 145, 111 P.3d at 1079. The court was concerned that when NRS 41.141 applies, it ''insulates a defendant from liability in cases in which a plaintiff's comparative negligence exceeds that 'of the parties to the action against whom recovery is sought.' '' *Id.* (quoting NRS 41.141). We agree that there are situations where the application of NRS 41.141 could theoretically insulate a defendant from liability, if the jury determined that the plaintiff's comparative negligence exceeded that of the defendant. This would thwart the legislators' purpose in passing NRS 41.133, which was intended to expand the rights of victims in litigation against offenders. Hearing on A.B. 268 Before the Assembly Judiciary Comm., 63d Leg. (Nev., March 20, 1985). However, we believe that it is possible to construe the language of both statutes so as to give each of them force without nullifying their manifest purpose.

NRS 41.133 only establishes liability, but does not mention damages. Simply because liability is established does not mean that a party is automatically entitled to damages. Therefore, application of NRS 41.133 allows a party to avoid having to prove liability, but does not provide an automatic recovery of damages, and a plaintiff must still establish damages. In establishing damages, defenses to damages such as comparative negligence are still permitted because they do not interfere with the determination of liability, only the amount of damages recoverable. Thus, while application of comparative negligence may in some circumstances result in no damages awarded to a plaintiff (*i.e.*, if the plaintiff is found to be more than 50 percent at fault), this result is not contrary to NRS 41.133 because that statute only establishes liability, not a guaranty that the plaintiff is entitled to collect damages.[3]

---

[3]Other jurisdictions have struggled with harmonizing disparate statutes such as ours, which provide for liability in a specific circumstance and could potentially preclude the application of statutory defenses. Colorado's Premises Liability Act created a similar difficulty to NRS 41.133. The Colorado Court of Appeals concluded that ''[r]eading the statutory scheme as a whole and giving harmonious effect to its various parts, the . . . statutory defenses to liability, such as comparative negligence, were not abrogated by the [Premises Liability Act].'' *Tucker v. Volunteers of America Co. Branch*, 211 P.3d 708, 710-11 (Colo. App. 2008).

CONCLUSION

Considering the statutory scheme as a whole and giving harmonious effect to both NRS 41.133 and NRS 41.141, we conclude that statutory defenses to liability, such as comparative negligence, are not abrogated by NRS 41.133. Where a defendant has been convicted of a malum in se offense, the judgment of conviction conclusively establishes the defendant's liability to the plaintiff victim. Summary judgment is appropriate as to liability as ''no 'genuine issue as to any material fact [remains] and [the plaintiff] is entitled to a judgment as a matter of law.' '' *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (first alteration in original) (quoting NRCP 56(c)). However, the plaintiff must still establish damages in order to recover, and at that time the defense may argue comparative negligence pursuant to NRS 41.141 as to the amount of damages recoverable.

Accordingly, we affirm the district court's judgment on the jury verdict. We also affirm the post-judgment order regarding attorney fees and prejudgment interest.[4]

PARRAGUIRRE, C.J., and PICKERING, J., concur.

EMILIA POSAS, APPELLANT, *v.*
NICOLE HORTON, RESPONDENT.

No. 51047

April 15, 2010 228 P.3d 457

Appeal from a district court judgment on a jury verdict in a tort action and post-judgment orders awarding costs and denying a motion for a new trial and an NRCP 60(b) motion. Eighth Judicial District Court, Clark County; James A. Brennan, Judge.

Motorist brought action against driver for injuries sustained when driver rear-ended motorist's vehicle. The district court entered judgment on jury's verdict in driver's favor and denied motorist's motion for new trial. Motorist appealed. The supreme

---

[4]The district court's denial of the Cromers' motion for attorney fees and interest was not an abuse of discretion pursuant to *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983). We conclude the following on the other issues raised by appellants: (1) the district court did not abuse its discretion by precluding questions about Wilson's possible probation violations or by allowing the defense to clarify that Wilson was not a billionaire; (2) because there was conflicting evidence, the jury could have found that Felicia Cromer failed to carry her burden as to her loss of consortium claim; and (3) the district court's additur of $4,000,000 was sufficient and accepted.

court, DOUGLAS, J., held that driver was not entitled to sudden-emergency instruction.

Reversed and remanded.

Sterling Law, LLC, and *Beau Sterling*, Las Vegas; *Jason S. Cook*, Las Vegas, for Appellant.

Ranalli & Zaniel, LLC, and *George M. Ranalli* and *Daniel A. Gonzales*, Henderson, for Respondent.

1. APPEAL AND ERROR.
   No appeal may be taken from an order denying a motion to alter or amend judgment.
2. AUTOMOBILES.
   Driver had not been exercising reasonable care at time she rear-ended motorist who had made sudden stop to avoid hitting pedestrian and, thus, was not entitled to sudden-emergency instruction in motorist's action against driver; driver admitted that she was ''following too close,'' and therefore, she was not facing sudden emergency but placed herself in position of peril through her own negligence. Restatement (Second) of Torts § 296.
3. AUTOMOBILES.
   The sudden-emergency instruction is only appropriate when unexpected conditions confront the actor requesting the instruction and the actor was otherwise exercising reasonable care.
4. AUTOMOBILES.
   In order to warrant a sudden-emergency jury instruction, the defendant must show that she was suddenly placed in a position of peril through no negligence of her own.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we consider whether the district court erred in giving a sudden-emergency jury instruction in a rear-end automobile collision case. We conclude that the district court erred in giving the sudden-emergency jury instruction in this case. We further clarify that the sudden-emergency doctrine applies when an emergency affects the actor requesting the instruction and the actor shows that he or she was otherwise exercising due care.

FACTS

The underlying litigation arises from a rear-end automobile accident. Appellant Emilia Posas was driving in her car when a woman pushing a stroller began to cross the street in the middle of traffic, directly in front of Posas's car. Posas stopped suddenly to

avoid hitting the jaywalking pedestrian. Respondent Nicole Horton was driving immediately behind Posas and hit the rear of Posas's car with the front-end of her car.

Horton testified that the weather was perfect on the day of the accident. Prior to the accident, traffic was moving slowly and the cars eventually came to a slow stop, indicating stop-and-go traffic conditions. Traffic began to move again and Horton began to move forward and reached a speed of about 10 to 15 miles per hour immediately before the collision. Horton was three to four feet behind Posas's vehicle right before the accident occurred, and she did not see the pedestrian cross in front of Posas. Horton testified, ''yeah, obviously, I was following too close, I rearended her . . . you know, I made a mistake.''

[Headnote 1]

As a result of the accident, Posas filed a personal injury action against Horton. Despite Posas's objection during the settling of jury instructions, the jury was given a sudden-emergency instruction.[1] The jury returned a verdict in favor of Horton, finding her free from liability for the accident. Posas moved for a new trial, which the district court denied.[2] This appeal followed.[3]

DISCUSSION

[Headnotes 2, 3]

Posas argues that the district court erred in giving the sudden-emergency instruction to the jury. We agree, and conclude that the error warrants a new trial. The sudden-emergency instruction is only appropriate when unexpected conditions confront the actor requesting the instruction and the actor was otherwise exercising reasonable care.

In addressing this case, we must start by looking at the applicability of the sudden-emergency doctrine. Since caselaw in

---

[1]The sudden-emergency instruction stated:

> A person confronted with a sudden emergency which he does not create, who acts according to his best judgment or, because of insufficient time to form a judgment fails to act in the most judicious manner, is not guilty of negligence if he exercises the care of a reasonably prudent person in like circumstances.

[2]To the extent that Posas seeks to appeal from the order denying her motion to alter or amend the judgment, we note that no appeal may be taken from such an order. *See Uniroyal Goodrich Tire v. Mercer*, 111 Nev. 318, 320 n.1, 890 P.2d 785, 787 n.1 (1995), *superseded by statute on other grounds as stated in RTTC Communications v. Saratoga Flier*, 121 Nev. 34, 110 P.3d 24 (2005).

[3]Although Judge Brennan entered the judgment on jury verdict, Judge Joseph T. Bonaventure entered the order awarding costs, Judge Charles Thompson entered the order denying the motion for new trial, and former Judge Elizabeth Halverson presided over the jury trial.

Nevada is sparse, we will review the doctrine in Nevada and other jurisdictions. Finally, we clarify the rule for when a sudden-emergency jury instruction is proper.

Standard of review

A district court's decision to give a jury instruction is reviewed for an abuse of discretion. *Allstate Insurance Co. v. Miller*, 125 Nev. 300, 319, 212 P.3d 318, 331 (2009). ''If a jury instruction is a misstatement of the law, it only warrants reversal if it caused prejudice and 'but for the error, a different result may have been reached.' '' *Id.* (quoting *Cook v. Sunrise Hospital & Medical Center*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008)). In order ''to reverse a district court judgment based on an erroneous jury instruction, prejudicial error must be established,'' and prejudicial error is established when the complaining party demonstrates that the error substantially affected the party's rights. *Cook*, 124 Nev. at 1007, 194 P.3d at 1220.

Applicability of the sudden-emergency jury instruction

In order to be entitled to the sudden-emergency jury instruction, the proponent must show there is sufficient

> evidence to support a finding that [the proponent] had been suddenly placed in a position of peril through no negligence of his or her own, and in meeting the emergency, . . . acted as a reasonably prudent person would in the same or a similar situation. There must be evidence of a sudden and unforeseeable change in conditions to which a driver was forced to respond to avoid injury.

8 Am. Jur. 2d *Automobiles and Highway Traffic* § 1081 (2007). In determining the standard of reasonable care, the Restatement (Second) of Torts further states, ''[t]he fact that the actor is not negligent after the emergency has arisen does not preclude his liability for his tortious conduct which has produced the emergency.'' Restatement (Second) of Torts § 296 (1965).[4] Therefore, a sudden emergency occurs when an unexpected condition confronts a party exercising reasonable care.[5] 57A Am. Jur. 2d *Negligence* § 198 (2004).

---

[4]The Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 9 (2010) also supports this principle. Comment d explains that ''the defendant's original negligence is a factual cause of harm to the plaintiff within the scope of liability.'' *Id.* § 9 cmt. d.

[5]The types of emergencies that courts have found to warrant a sudden-emergency instruction include a ''dust cloud, a moving object, a sudden blocking of the road, the sudden swerving of another vehicle, blinding lights[,] a dense patch of fog,'' an unexpected brake failure, and a stopped vehicle with-

Nevada has previously recognized the use of a sudden-emergency jury instruction but has not defined when it should be applied. *See Rocky Mt. Produce v. Johnson*, 78 Nev. 44, 369 P.2d 198 (1962); *Jones v. Viking Freight System*, 101 Nev. 275, 701 P.2d 745 (1985); *Brascia v. Johnson*, 105 Nev. 592, 781 P.2d 765 (1989).[6] We take this opportunity to clarify when a sudden-emergency instruction should be given.

In this case, Horton advanced the position that the sudden-emergency instruction was properly given to the jury because she was not at ''fault since she was confronted with a sudden emergency.'' Horton's main argument is that the emergency was created by the pedestrian with the stroller crossing in front of Posas's car.[7] Horton argues that she met the burden for the sudden-emergency instruction because the emergency was created by the pedestrian suddenly and unexpectedly crossing the street, that she did not cause the pedestrian to cross the street, and that Horton and Posas each acted as a reasonable person would have by braking to keep from hitting the pedestrian. However, Horton's own testimony belies that fact in light of her statement that she ''was following too close.'' Thus, we conclude that Horton cannot appropriately claim that she faced a sudden emergency. She placed herself in a position of peril through her own negligence.

The facts of this case are similar to those in *Templeton v. Smith*, and we take this opportunity to adopt the analysis in that case. 744 P.2d 1325 (Or. Ct. App. 1987). In *Templeton*, the defendant was traveling behind the plaintiff and looked in her rearview mirror momentarily; when she looked back ahead, the plaintiff had

---

out emergency flashers activated at night. *Cunningham v. Byers*, 732 A.2d 655, 658 (Pa. Super. Ct. 1999); *Chancellor v. Sippel*, 495 P.2d 556 (Colo. App. 1972); *Holtermann v. Cochetti*, 743 N.Y.S.2d 590 (App. Div. 2002).

[6]We also note that *Meagher v. Garvin*, 80 Nev. 211, 391 P.2d 507 (1964), discussed the sudden-emergency doctrine, but the underlying case was not before a jury. However, in both *Rocky Mountain* and *Meagher*, this court upheld the district court's findings that the sudden-emergency doctrine was not applicable in cases where the defendants had failed to exercise due care. *Rocky Mountain*, 78 Nev. at 55, 369 P.2d at 203-04; *Meagher*, 80 Nev. at 214-15, 391 P.2d at 509. In *Jones*, the court found that a sudden-emergency instruction was properly rejected because the circumstances that led to the decedent's ''death did not arise in a sudden manner, but arose as a natural consequence of his own manifestly inappropriate volitional acts.'' *Jones*, 101 Nev. at 276-77, 701 P.2d at 746. In *Brascia*, the court found that any error in giving the sudden-emergency jury instruction was harmless because the sudden-emergency doctrine was not applied since Brascia was found negligent. *Brascia*, 105 Nev. at 595-96, 781 P.2d at 768.

[7]During the settling of jury instructions, Horton argued that the emergency she is alleging is that Posas stopped suddenly and slammed on her brakes. This argument would also not meet the sudden-emergency doctrine standard to warrant a sudden-emergency jury instruction.

stopped, and the defendant was unable to avoid the collision. *Id.* at 1326. After receiving an instruction on sudden emergency, the jury returned a verdict for the defendant. *Id.* The plaintiff appealed, arguing the trial court erred in giving the sudden-emergency instruction. *Id.*

In reversing the jury's verdict, the court stated, ''[w]e doubt that an emergency charge should ever be given in an ordinary automobile accident case.'' *Id.* The court also reasoned that certain so-called emergencies should

> ''be anticipated, and the actor must be prepared to meet them when he engages in an activity in which they are likely to arise. Thus, under present day traffic conditions, any driver of an automobile must be prepared for the sudden appearance of obstacles and persons in the highway, and of other vehicles at intersections.''

Id. (quoting W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 33 (5th ed. 1984)). The Oregon court concluded that the ''[d]efendant was not confronted with anything even closely resembling an emergency.'' *Id.* The fact that the plaintiff came to a stop sooner than the defendant expected is the type of hazard that ''should be anticipated under the circumstances of ordinary driving. There were no extraordinary circumstances, such as a truck careening out of control or a sudden mechanical failure.'' *Id.* Further, drivers must ''anticipate certain emergency situations such as the sudden appearance of obstacles or persons, darting children, crowded intersections and sudden stops . . . . These circumstances may be so routine as to make inappropriate the sudden emergency instruction.'' *Gagnon v. Crane*, 498 A.2d 718, 721 (N.H. 1985) (internal citations omitted).

[Headnote 4]

As described above, in order to warrant a sudden-emergency jury instruction, Horton must show that she was suddenly placed in a position of peril through no negligence of her own, which she failed to do. As in *Templeton*, Horton was faced with an obstacle that normally arises in driving situations—the car in front of her stopped to avoid hitting a pedestrian.[8] Horton's admitted act of following too closely created her peril, and she was unable to stop her vehicle in a timely and safe manner in response to that ordinary traffic situation. Thus, as articulated in *Templeton*, there were no extraordinary circumstances, and no emergency situation confronted Horton.

---

[8]NRS 484.3245(1) states that ''[a] driver of a motor vehicle shall . . . [e]xercise due care to avoid a collision with a pedestrian.''

Additionally, for the sudden-emergency doctrine to apply, the emergency must affect the actor. If there is an emergency, the actor must show that he or she was otherwise exercising due care to put forth a sudden-emergency instruction. It should be noted that even if an emergency situation had been created by the pedestrian in this case, it would have been an emergency that confronted Posas, not Horton. The doctrine is applicable to the party facing the emergency, not a party who creates his or her own emergency. *See* 57A Am. Jur. 2d *Negligence* § 213 (2004).

Pursuant to our adoption of the *Templeton* analysis, the district court abused its discretion in instructing the jury on sudden emergency in this case. The instruction tended to mislead or confuse the jury, and the error was prejudicial. Although the instruction itself properly described the sudden-emergency doctrine, Horton failed to show she was exercising reasonable care. But for the error, as to the use of reasonable care by Horton, a different result may have been reached by the jury. Further, the record includes evidence to support Posas's claim that the error substantially affected her rights, namely, Horton's own admission that she was following Posas too closely at the time of the accident.

Therefore, the sudden-emergency jury instruction, as used in this case, created prejudicial error that warrants granting Posas a new trial. Accordingly, we reverse the judgment of the district court and remand for a new trial consistent with this opinion.[9]

PARRAGUIRRE, C.J., and HARDESTY, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

---

[9]Posas raises several other arguments on appeal. Having considered these additional arguments, we conclude that they are without merit. Further, because we reverse and remand for a new trial, we also reverse the district court's post-judgment order awarding costs to Horton.

EASTON BUSINESS OPPORTUNITIES, INC.; AND KEITH EASTON, APPELLANTS, *v.* TOWN EXECUTIVE SUITES–EASTERN MARKETPLACE, LLC; MICHAEL A. VESPI; AND TOWN CONSULTING LLC, RESPONDENTS.

No. 50060

EASTON BUSINESS OPPORTUNITIES, INC.; AND KEITH EASTON, APPELLANTS, *v.* TOWN EXECUTIVE SUITES–EASTERN MARKETPLACE, LLC; MICHAEL A. VESPI; AND TOWN CONSULTING LLC, RESPONDENTS.

No. 50751

May 6, 2010 230 P.3d 827

Consolidated appeals from a district court judgment in an action to recover a real estate broker's commission and from a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Real estate broker brought action to recover commission claimed under an exclusive right-to-sell brokerage agreement for the sale of a business. The district court entered judgment in favor of the seller and against the broker's assignee, and entered post-judgment order awarding attorney fees and costs. Assignee appealed. The supreme court, PICKERING, J., held that: (1) assignment of commission rights from brokerage agreement did not materially change the terms of the agreement; (2) agreement did not contain valid anti-assignment clause; (3) assignee was a real party in interest for purposes of maintaining an action; (4) assignment occurred in December 2003, rather than in May 2006; (5) agreement did not impose duty upon broker to give seller notice of buyers to whom sale would have triggered commission; and (6) liability for commission was established as matter of law.

Reversed and remanded.

David J. Winterton & Associates Ltd. and *David J. Winterton*, Las Vegas, for Appellants.

Prince & Keating and *Dennis M. Prince* and *Douglas J. Duesman*, Las Vegas, for Respondents.

1. ASSIGNMENTS.

Assignment of commission rights from exclusive right-to-sell brokerage agreement did not materially change the terms of the agreement as to seller, thus supporting validity of assignment of commission rights, where the assignment occurred after the exclusive listing period had expired, and thus, broker had provided the exclusive listing services for which seller owed its return performance in form of payment of commission.

2. ASSIGNMENTS.
   Exclusive right-to-sell brokerage agreement for the sale of a business did not contain a valid anti-assignment clause, thus supporting validity of assignment of commission rights; standard no-oral-modification clause in agreement did not mention assignment, much less specifically prohibit it.
3. ASSIGNMENTS.
   A standard no-oral-modification clause in a brokerage agreement cannot be pressed into service as an anti-assignment clause because, without more, an assignment does not modify the terms of the underlying contract, it is a separate agreement between the assignor and assignee which merely transfers the assignor's contract rights, leaving them in full force and effect as to the party charged.
4. ASSIGNMENTS.
   Assignee of commission rights from an exclusive right-to-sell brokerage agreement for the sale of a business was a real party in interest for purposes of maintaining an action for failure to pay commission; function of real party in interest rule was to protect defendant against a subsequent action by party actually entitled to recover, and affidavit filed in case confirmed that assignee had the sole right to sue for the commission. NRCP 17(a).
5. ASSIGNMENTS.
   There is no general requirement as to when an assignment of contractual rights must be made and even when the claim is not assigned until after the action has been instituted, the assignee is the real party in interest and can maintain the action. NRCP 17(a).
6. ASSIGNMENTS.
   In order to constitute an effective assignment of contractual rights, the assignor must manifest a present intention to transfer its contract right to the assignee.
7. ASSIGNMENTS.
   Assignment of commission rights from an exclusive right-to-sell brokerage agreement for the sale of a business occurred in December 2003, rather than in May 2006, as seller suggested, where assignor accepted payment from assignee in exchange for certain listings and expiration rights in December 2003, but assignor did not confirm the transfer of rights in writing until it supplied an affidavit in connection with litigation in May 2006.
8. BROKERS.
   Where an action is based on a real estate listing agreement, the right of the broker to compensation must be governed by that agreement.
9. BROKERS.
   Exclusive right-to-sell brokerage agreement for the sale of a business did not impose a duty upon the broker to give the seller notice of those buyers to whom a sale during an extension period would have triggered a commission; agreement did not condition the seller's liability for the commission on the seller being notified of potential buyers who carried commission risk or knowingly selling out from under the broker, and there was no textual ambiguity in the agreement or other legal basis to import such a duty in the agreement.
10. CONTRACTS.
    The rule that contracts should be construed against the drafter applies only as a rule of last resort when the contract is ambiguous or unconscionable.

11. BROKERS.
    Liability for the commission pursuant to an exclusive right-to-sell brokerage agreement for the sale of a business was established as a matter of law, where broker showed the property to buyer during the exclusive listing period, and seller sold property to buyer during the extender-clause period.
12. BROKERS.
    Where the parties negotiated specific terms for payment of a commission in a real estate listing agreement, the procuring cause doctrine, which states that the agent who effects the sale is entitled to the commission, is not a part of the listing agreement so as to modify those terms, especially in the context of a commission claim based exclusively on an exclusive right-to-sell agreement.

Before PARRAGUIRRE, C.J., DOUGLAS and PICKERING, JJ.

OPINION

By the Court, PICKERING, J.:

This dispute involves a commission claimed under an exclusive right-to-sell brokerage agreement for the sale of a business. After a bench trial, the district court ruled in favor of the seller and against the broker's assignee. It found the assignment ineffective and the commission unrecoverable, based on the broker's breach of an implied duty to have given the seller a list of the people to whom the broker had shown the business, to whom the seller could not sell during the extension period without incurring liability for a commission. The agreement, as written, supports the opposite result and should have been upheld. Upholding the commission claim makes it necessary to reach the assignee's fraudulent conveyance claims, as to which unresolved issues of fact remain. Accordingly, we reverse and remand.

I.

The brokerage agreement was between Town Executive Suites–Eastern Marketplace, LLC (TES), as seller, and Century 21-Advantage Gold and Michael Brelsford, as broker (collectively, Century 21). The agreement gave Century 21 the ''exclusive and irrevocable'' right to sell TES's office suite business for a six-month period, from May 19, 2003, to November 18, 2003.[1] If the business sold on terms acceptable to TES during this exclusive list-

[1]TES held a master lease on the office suite business. Although the district court's findings refer to TES being sold, it appears from the record that this was an asset sale of TES's rights in the master lease, personal property, and goodwill, not a sale of ownership rights in TES.

ing period, TES owed Century 21 a 10-percent commission, regardless of who originated the sale.

Included in the agreement was an ''extender'' clause. The extender clause provided that the same 10-percent commission ''shall be due . . . (c) if within 180 calendar days of the final termination . . . of this Agreement, the Property is sold, conveyed, or otherwise transferred to anyone with whom the Broker has had negotiations or to whom the Property was shown prior to the final termination,'' with one exception: ''This section (c) shall not apply if Seller enters into a valid Brokerage Listing Agreement with another licensed real estate Broker after the final termination of this Exclusive Brokerage Listing Agreement.''

In late January 2004, after the exclusive listing expired but still within the 180-day extender-clause period, TES sold its business to a buyer to whom Century 21 had shown it during the exclusive listing period, Chip Lightman. Although not a licensed broker, TES's principal, Michael Vespi, had once owned a real estate agency, and he decided to handle the sale of TES's business on his own, without hiring another broker. Vespi asked Lightman if he had an agent or broker, and Lightman said he did not. However, TES didn't check with Century 21 to see if Lightman was someone to whom Century 21 had shown the property during the exclusive listing period, thus triggering a commission under the extender clause. Mistakenly assuming the sale would be commission-free, TES sold its business to Lightman for a lower price than it would have if it had figured in a commission.

The following facts were found by the district court to be undisputed: (1) Century 21 showed the TES business to Lightman during the exclusive listing period; and (2) TES sold its business to Lightman in January 2004, during the extender-clause period. The brokerage agreement as written seems to require payment of a commission in these circumstances. However, the district judge held the opposite based on its additional finding that TES ''did not knowingly 'breach' the Brokerage Listing Agreement by selling the property to [Lightman] at the end of January 2004 when [TES] did not know Mr. Lightman was previously shown the property by [Century 21] during the exclusive listing period.''

The agent at Century 21 who handled the TES listing was appellant Keith Easton. In December 2003, after the listing expired but still during the extender-clause period, Easton obtained his own broker's license and left Century 21 to open Easton Business Opportunities, Inc. Easton testified he bought out his listings and expirations from Century 21 when he left. No formal written assignment was produced, but in a May 2006 affidavit, Century 21 broker Michael Brelsford, on behalf of himself and Century 21, confirmed that Easton ''purchased the rights to all his listings in December 2003'' and that the TES listing was ''[a]mong the list-

ings that [Century 21] transferred'' to Easton. TES knew Easton had left Century 21 and how to contact him: TES's principal, Vespi, leased Easton the office space he moved into when he left Century 21, and Vespi hired Easton as broker on another property of his.

Some time later, Lightman decided to resell the TES office suite business and asked Easton to act as listing agent and broker on the resale. Thus having learned about TES's business being sold to a buyer he'd developed while with Century 21, Easton asked TES for the commission Easton believed was due. TES refused. By then, TES had allegedly transferred most of its assets, including the office suite sale proceeds, to either Vespi or its affiliate, Town Consulting LLC.

Appellants Keith Easton and Easton Business Opportunities, Inc. (collectively, Easton) sued for the commission, naming respondents TES, Vespi, and Town Consulting (collectively, TES) as defendants on breach of contract, alter ego, unjust enrichment, and fraudulent conveyance claims. After a one-day bench trial, the district court entered judgment against Easton on all claims and, thereafter, awarded respondents their attorney fees and costs. Easton appeals.

The district court denied Easton's claims on three grounds relevant to this appeal.[2] First, it held that Century 21's assignment of its commission rights to Easton was invalid and came too late in any event for Easton to qualify as the real party in interest under NRCP 17(a), as construed in *Thelin v. Intermountain Lumber & Builders Supply, Inc.*, 80 Nev. 285, 392 P.2d 626 (1964). Second, it held that no commission was due, because neither Century 21 nor Easton reminded TES about the extender clause or gave TES a list of prospective buyers who were off-limits during the extender-clause period. Third, treating Easton's fraudulent conveyance claims as targeting TES's sale of its business, rather than its transfer of the sale proceeds to its affiliates, it denied Easton's fraudulent conveyance claims as statutorily insufficient. Finding error in each of these determinations, we reverse.

II.

The first question to be addressed is assignability. Based on the agreement as written and the facts the district court found to be undisputed, we conclude that the commission was assignable and that Century 21 validly assigned it to Easton. From this it follows that, as Century 21's assignee, Easton has real party in interest status under NRCP 17(a).

---

[2]Easton does not challenge the district court's rejection of alter ego liability or the partial summary judgment order declaring that Vespi signed the agreement as manager for TES, not individually.

A.

Under ordinary rules of contract law, a contractual right is assignable unless assignment materially changes the terms of the contract or the contract expressly precludes assignment. Restatement (Second) of Contracts § 317(2)(a)-(c) (1981). Because the law looks with ''favor on the free assignability of rights and frowns on restrictions that would limit or preclude assignability, . . . [a]nti-assignment clauses [are] narrowly construed.'' 9 John E. Murray, Jr., *Corbin on Contracts* § 49.9, at 214 (rev. ed. 2007). ''To be effective, [an] antiassignment clause should contain a specific prohibition on the power to make an assignment and specifically state that any attempted assignments will be void or invalid.'' 29 Richard A. Lord, *Williston on Contracts* § 74:22 (4th ed. 2003); *see* Restatement (Second) of Contracts § 322 (1981).

[Headnote 1]

Century 21's assignment of commission rights to Easton did not materially change the terms of the brokerage agreement as to TES. The assignment occurred, at the earliest, when Easton left Century 21 in December 2003, after the exclusive listing terminated. By then, Century 21 had provided the exclusive listing services for which TES owed its return performance—payment of a commission should the business be sold during the extender-clause period to a buyer Century 21 had shown the property to while listing it. ''When the obligor's duty is to pay money, a change in the person to whom the payment is to be made is not ordinarily material,'' Restatement (Second) of Contracts § 317 cmt. d (1981), and there is nothing extraordinary about the assignment of commission rights here.[3]

[Headnote 2]

Neither does the brokerage agreement contain a valid anti-assignment clause. The district court held otherwise, calling on the clause in the agreement prohibiting oral modifications to do double duty as an anti-assignment clause. But the clause on which the district court relied says only that ''[t]he terms of this Agreement may not be amended, modified or altered except through a writ-

[3]Since Century 21 had already performed its listing services, no question arises as to it having remaining obligations to TES ''so 'personal' or involv[ing] such unique skills that [they] may not be delegated.'' 9 *Corbin on Contracts*, *supra*, § 49.4, at 199. Assigning its commission rights wouldn't have discharged any remaining duties of Century 21's in any event, absent a novation, which isn't asserted. *See* Restatement (Second) of Contracts § 318 cmt. d (1981) (''An obligor is discharged by the substitution of a new obligor only if the contract so provides or if the obligee makes a binding manifestation of assent, forming a novation. Otherwise, the obligee retains his original right against the obligor.'' (citations omitted)).

ten agreement signed by all of the parties.'' This standard no-oral-modification clause does not mention assignment, much less specifically prohibit it. It lacks the specific language prohibiting assignment that the law requires of a valid anti-assignment clause.

[Headnote 3]

Forbidding oral modification and prohibiting assignment are two different things. As *Citibank, N.A. v. Tele/Resources, Inc.*, 724 F.2d 266 (2d Cir. 1983), holds, a standard no-oral-modification clause cannot be pressed into service as an anti-assignment clause because, without more, ''[a]n assignment does not modify the terms of the underlying contract. It is a separate agreement between the assignor and assignee which merely transfers the assignor's contract rights, leaving them in full force and effect as to the party charged.'' *Id.* at 269.

For these reasons we disagree with the district court's reading of the brokerage agreement as a matter of law and conclude that, as written, the brokerage agreement permitted Century 21 to assign its commission rights to Easton.

B.

The district court alternatively held that, even if the agreement permitted assignment, Easton still could not prevail because the assignment didn't occur until May 2006, when Brelsford's affidavit confirming Century 21's transfer of commission rights to Easton was filed. Citing *Thelin v. Intermountain Lumber & Builders Supply, Inc.*, 80 Nev. 285, 392 P.2d 626 (1964), the district court concluded that post-suit ''[a]ssignments do not 'relate back' to the date [a] Complaint was filed,'' requiring dismissal under NRCP 17(a). This was error, for two reasons.

[Headnote 4]

First, *Thelin* was decided in 1964, before the 1971 amendments to the real party in interest provisions in NRCP 17(a). The 1971 amendments conformed NRCP 17(a) to Fed. R. Civ. P. 17(a), as the latter had been amended in 1966, adding the following final sentence to Rule 17(a):

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The purpose of these amendments was to make unmistakably clear that ''the modern function of the [real party in interest] rule in its negative aspect is simply to protect the defendant against a subse-

quent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.'' Fed. R. Civ. P. 17(a) advisory committee's note (1966).

[Headnote 5]

Even before these amendments, *Thelin*'s rigid holding—that a post-suit assignment cannot cure an initial real party in interest deficiency—was questionable. *See Kilbourn v. Western Surety Co.*, 187 F.2d 567, 571-72 (10th Cir. 1951) (deeming a post-suit assignment sufficient to establish the assignee-plaintiff as the real party in interest under Fed. R. Civ. P. 17(a), given the overriding purpose of the modern Rules of Civil Procedure ''to unshackle the practice of law in the courts from the straight jacket of technical rules of pleading and procedure''), *noted in* 6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 1545, at 351 n.11 (1990). After Rule 17(a)'s amendment, it is today taken as settled law that ''[t]here is no general requirement as to when an assignment must be made and . . . even when the claim is not assigned until after the action has been instituted, the assignee is the real party in interest and can maintain the action.'' 6A Wright & Miller, *supra*, at 350-51. *See Federal Deposit Ins. Corp. v. Hurdman*, 655 F. Supp. 259, 267 (E.D. Cal. 1987) (noting that if the assignor provides post-suit confirmation of the assignment, the objecting defendant is protected from inconsistent claims; whether treated as an assignment or a ratification, this is enough to establish a plaintiff's real party in interest status under Rule 17(a) (quoting Fed. R. Civ. P. 17(a) advisory committee's note (1966); 6C Wright & Miller, *supra*, § 1545, at 654 (1971))).

The affidavit that Century 21/Brelsford filed in this case confirmed that Easton had the sole right to sue for the commission, and it evidenced both Century 21's assignment of rights to Easton and its ratification of Easton's right to sue. This amply protected TES from inconsistent claims or judgments; Rule 17(a) didn't require more. To the extent *Thelin* suggests that a plaintiff cannot establish real party in interest status and avoid dismissal by post-suit ratification or assignment of rights, it conflicts with the prevailing interpretation of the post-amendment version of NRCP 17(a) and no longer represents good law.

There is a second, equally basic reason to reject *Thelin*'s application to this case: The finding that the assignment didn't occur until May 2006, the date of the Century 21/Brelsford affidavit, is in error. The error is either one of law, in presupposing, as TES contends, that a valid assignment requires a signed writing or notice to the obligor; or an error of fact, in transposing the date of the Century 21/Brelsford affidavit (May 2006) with the date of the assignment itself (December 2003, per both Brelsford's affidavit and Easton's testimony). Either way the result is the same: The district court's alternative finding that there was a valid assignment

is correct, but the assignment occurred in December 2003 and not May 2006.

[Headnotes 6, 7]

''[I]n the absence of statute or a contract provision to the contrary, there are no prescribed formalities that must be observed to make an effective assignment.'' 9 *Corbin on Contracts*, *supra*, § 47.7, at 147. The assignor must manifest a present intention to transfer its contract right to the assignee. *Stuhmer v. Centaur Sculpture Galleries*, 110 Nev. 270, 275, 871 P.2d 327, 331 (1994). Absent some additional contract- or statute-based requirement, no particular formality in expressing that intention needs to be followed:

> It is essential to an assignment of a right that the obligee manifest an intention to transfer the right to another person without further action or manifestation of intention by the obligee. The manifestation may be made to the other or to a third person on his behalf and, except as provided by statute or by contract, may be made either orally or by a writing.

Restatement (Second) of Contracts § 324 (1981); *see id*. cmt. a. Applying section 324 here, the manifestation of intent to transfer a contract right was by Century 21, as ''obligee,'' to Easton, as ''the other.'' The assignment was complete as of December 8, 2003, the date both Brelsford and Easton say Century 21 accepted payment from Easton in exchange for certain listings and expiration rights, including TES's.

Century 21 did not confirm the transfer of rights in writing until it supplied the Brelsford affidavit in May 2006. However, nothing required a signed writing for the assignment of commission rights to be effective. As discussed above, the brokerage agreement is silent on assignment; it neither precludes nor specifies a particular form for a valid assignment. Nor have the parties identified any statute that prescribes special formalities for assignment of commission rights.[4]

---

[4]The parties make no argument that NRS 645.320(1), as a type of statute of frauds, required Century 21's assignment of commission rights to Easton to be in writing. Given the general law that, while statute of frauds provisions may ''prevent enforcement against an assignor unless there is a memorandum in writing or some substitute formality, . . . they cannot ordinarily be asserted by third persons, including the obligor of an assigned right,'' Restatement (Second) of Contracts § 324 cmt. b (1981), we decline to find a writing requirement based on NRS 645.320(1) sua sponte. *See also In re Circle K Corp.*, 127 F.3d 904, 908 (9th Cir. 1997) (rejecting the argument that the obligor could assert a valid statute of frauds objection to his obligee's undocumented transfer of its interest to its assignee; ''[t]he parties to the assignments do not challenge their validity; it would be for them, not [the obligor], to raise the statute of frauds as a defense to enforcement of the assignments if they so chose'' (citing Restatement (Second) of Contracts § 144 (1982))).

TES finally complains that neither Century 21 nor Easton gave notice of the assignment until Easton demanded the commission but this argument is a nonstarter. While failure to give notice of an assignment may affect the rights of the assignee in the event the obligor delivers performance to the obligee/assignor before being notified of the assignment, *see* 29 *Williston on Contracts*, *supra*, § 74:15, it normally does not invalidate an otherwise valid assignment. 6A C.J.S. *Assignments* § 10 (2004). *See also Wood v. Chicago Title Agency*, 109 Nev. 70, 847 P.2d 738 (1993); *Washoe Co. Bank v. Campbell*, 41 Nev. 153, 167 P. 643 (1917).

For these reasons, we affirm the district court's alternative finding that Century 21 validly assigned its commission rights to Easton but reject as clearly erroneous and contrary to law the finding that the assignment occurred in May 2006 as opposed to December 2003.

III.

The second question to be addressed is the proper construction of the exclusive right-to-sell brokerage agreement. The district court imposed a duty on the broker to notify its seller of potential buyers whose history with the broker carries commission exposure on a sale during the extender-clause period. Since notice wasn't given and the seller didn't know its buyer would trigger liability for a commission, the district court denied recovery. This was error, as it reallocated the responsibility and risk laid out in the brokerage agreement without adequate legal or contractual basis for doing so.

A.

[Headnote 8]

Easton's commission claim is based on the exclusive right-to-sell brokerage agreement. ''[W]here the action is based on a listing agreement[, t]he right of the [broker] to compensation must be governed by that agreement.'' *Nollner v. Thomas*, 91 Nev. 203, 207, 533 P.2d 478, 480-81 (1975) (footnote omitted); *accord Caldwell v. Consolidated Realty*, 99 Nev. 635, 638, 668 P.2d 284, 286 (1983) (''Where a broker's action to recover a commission . . . is based on a listing agreement, the terms of the agreement govern the broker's right to compensation.'').

[Headnote 9]

The brokerage agreement gave Century 21 the exclusive right to sell the business for a 6-month period and added to that a 180-day extension period. If TES sold during the extension period to a buyer with whom Century 21 had negotiations or to whom it showed the property during the exclusive listing period, TES owed Century 21 a commission (with one exception that does not apply

here). The brokerage agreement did not condition the seller's liability for the commission on the seller being notified of potential buyers who carried commission risk or knowingly selling out from under the broker. It placed liability on the seller for the commission if the seller sold during the extension period to a buyer to whom the broker had shown the property or negotiated with—in other words, it allocated the risk of being wrong about the buyer being commission-free to the seller. The district court found that, without checking with the broker, TES sold to a buyer Century 21 had developed. Absent breach of some other duty by Century 21, a commission was owed under the agreement as written. Indeed, when asked at trial if the agreement didn't support liability for a commission on TES's sale to Lightman, even TES's principal, Vespi, agreed: ''That's what the listing agreement says. Yes, sir.''

Despite this concession, TES cites *King v. Dean*, 249 N.E.2d 45 (Ohio 1969), and *Mayo v. Century 21 Action Realtors*, 823 S.W.2d 466 (Ky. Ct. App. 1992), and urges that the agency relationship between a broker and its seller requires imposing on the broker the duty to advise the seller of the names of potential buyers who carry commission exposure, even where, as here, the agreement does not state this duty. These cases represent the minority rule on an issue that has divided courts nationally. T.C. Williams, Annotation, *Real-Estate Broker's Right to Commissions as Affected by Owner's Ignorance of Fact That Purchaser Had Been Contacted by Broker*, 142 A.L.R. 275 (1943 & Supp. 2010) (collecting cases).

The majority view holds that, ''[h]aving promised the broker a commission, the principal ordinarily should know that the appearance of a customer may have been caused by the broker, and to avoid liability for payment he should make inquiries of the broker.'' Restatement (Second) of Agency § 448 cmt. f (1958). The Restatement illustrates its comment with the following:

> P promises A a commission if he will secure a purchaser for Blackacre. A advertises, and T, seeing it, goes to A. T feigns indifference but soon afterward applies to P. P asks T if he comes as a result of any action on the part of A. T falsely says that he has not seen A's advertisement. Without speaking to A, and because he believes T's statement, P sells to him at a price lower than the asking price. A is entitled to his commission.

Id. illus. 9. These are analogous to the facts presented here, and represent the better-reasoned view. *Monadnock Ins. Agency, Inc. v. Manning*, 374 A.2d 961, 510 (N.H. 1977); *see also Shands v. Wm R. Winton, Ltd.*, 91 P.3d 416, 419 (Colo. Ct. App. 2004).

At least one state, Minnesota, has imposed the duty for which TES contends by statute. Minn. Stat. Ann. § 82.21(1)(b)(5) (West

2009), *discussed in* Barlow Burke, Jr., *Law of Real Estate Brokers* § 4.03, at 4-42 (2009) (noting that the Minnesota statute requires that a broker who uses an extender clause—there called an override clause—''must supply the vendors with a 'protective list' of prospects with whom the broker has dealt during the listing period''). And, of course, parties are free to negotiate and include a clause requiring the broker to give the seller notice of those buyers to whom a sale during the extension period will trigger a commission—such clauses, if included, are upheld. Burke, *supra*, at 4-32; 12 C.J.S. *Brokers* § 253 (2009) (noting that parties can contractually require notice of prospective buyers who carry commission risk and that, absent contractual provision or other special circumstance, the seller's ignorance of the broker's involvement does not normally defeat liability for a commission). But absent contract provision or statutory requirement, we are loath to impose such an obligation as a matter of common law and, in so doing, rewrite the agreement according to our views of public policy pertaining to the best form of contract to govern a broker's relationship with its seller. 5 *Williston on Contracts*, *supra*, § 12:3 (''public policy . . . requires that parties of full age and competent understanding must have the greatest freedom of contracting, and contracts, when entered into freely and voluntarily, must be upheld and enforced by the courts'').

B.

As a fallback, TES argues that the agreement, which was on a form supplied by the broker, should be construed against Easton, as Century 21's assignee. However, TES fails to identify any textual ambiguity in the agreement or other legal basis for importing this policy-based duty into the written agreement both parties signed. The commission could have been avoided or passed on to the buyer if the seller had checked with the broker and either declined the deal or increased its price. This practical consideration didn't introduce an ambiguity into the agreement or confront the district court with conflicting legal duties. It had significance only as a commonsense solution to the problem the seller said required the court to read new terms into the agreement.

[Headnote 10]

When asked for an interpretation of the extender clause that did not require payment of a commission in this case, TES's principal, Vespi, had no answer, except to say that he didn't read the agreement or have it in mind when he sold to Lightman. *But see Holzman v. Blum*, 726 A.2d 818, 831 (Md. Ct. Spec. App. 1999) (''The Agreement clearly addressed the terms and conditions under which [the sellers] would owe the Broker a fee and [the Broker] had no legal duty to remind [sellers] of the terms of the

Agreement that [they] had signed.''). To imply a duty into an integrated agreement requiring the broker to notify the seller of the prospects it developed—or to remind the seller of its obligations under an extender clause—would impinge on the parties' freedom of contract with regard to the compensation to be paid the agent, as to which the parties, here both equally sophisticated, dealt with each other at arm's length, and is inappropriate. *Id.* at 831-32.[5]

Nollner v. Thomas, 91 Nev. 203, 533 P.2d 478 (1975), is analogous. *Nollner* involved an open listing agreement. ''To avoid disputes the parties fixed the conditions upon which a commission would be payable and agreed upon the provision for payment if a sale was made in accordance with the contract terms.'' *Id.* at 207, 533 P.2d at 481. The sale didn't qualify for a commission under the agreement as written, but the district court implied terms into the agreement to allow recovery by the broker. *Id.* This court reversed, holding that it was error to ''read into [the agreement] a clause or condition which does not exist.'' *Id.* Although the outcomes are opposite in terms of who wins, this case and *Nollner* invoke under the same legal principle: A court has the obligation to enforce an unambiguous agreement as written, absent conflict with statute, offense to public policy, ambiguity, fraud, unconscionability, or other recognized basis for avoidance.

C.

[Headnotes 11, 12]

The parties mention ''procuring cause'' in their briefs but do not identify any legitimate role for the doctrine in this case. Where, as here, the ''parties negotiated specific terms for payment of [a] commission, [the] 'procuring cause' doctrine [is] not a part of [the] listing agreement so as to modify those terms,'' *Carrigan v. Ryan*, 109 Nev. 797, 799, 858 P.2d 29, 31 (1993) (citing *Nollner*, 91 Nev. at 207, 533 P.2d at 481), especially in the context of a commission claim based exclusively on an exclusive right-to-sell agreement, *see Atwell v. Southwest Securities*, 107 Nev. 820, 825, 820 P.2d 766, 769-70 (1991). In the exclusive right-to-sell context, ''[t]he duty to pay the commission is not viewed as a remedial penalty for breach of an executory contract but as a debt owed for a fully performed contract [and] it is unnecessary for the broker to prove that he . . . was the procuring cause of the sale'' if any of the eventualities stated in the agreement as giving rise to liability

---

[5]The fact that the agreement was on a standard realtor's Multiple Listing Service form does not defeat its enforcement, as TES suggests. The rule that contracts should be construed against the drafter—*contra proferentem*—applies only ''as a rule of last resort when the contract is ambiguous or unconscionable.'' *Thompson v. Amoco Oil Co.*, 903 F.2d 1118, 1121 n.3 (7th Cir. 1990). Ambiguity is not established and unconscionability is not asserted.

for the commission occur. 10 Patrick Rohan, Bernard Goldstein & Charles Bobis, *Real Estate Brokerage Law and Practice* § 4.06[5][a] (2009). Here, the district court found that Century 21 showed the property to Lightman during the exclusive listing period and that TES sold the property to him during the extender-clause period. Liability for the commission was thus established as a matter of law on these facts under the agreement as written.

IV.

The final issue concerns Easton's fraudulent conveyance claim. From the record, it appears that Easton asserted this claim under NRS Chapter 112. The fraudulent conveyance claim did not concern TES's sale of its business to Lightman (the buyer of the business) but TES's transfer of the proceeds of that sale and other assets to its affiliates, Vespi and/or Town Consulting. Because the district court did not make the findings required to adjudicate the fraudulent conveyance claim under *Herup v. First Boston Financial*, 123 Nev. 228, 162 P.3d 870 (2007), and *Sportsco Enterprises v. Morris*, 112 Nev. 625, 917 P.2d 934 (1996), we reverse and remand for further proceedings on the fraudulent conveyance claim. This disposition also leads us to vacate the award of attorney fees, which was premised on the judgment against Easton on the commission claim.

REVERSED and REMANDED.

PARRAGUIRRE, C.J., and DOUGLAS, J., concur.

THE STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT, *v.* AUNDREA TAYLOR-CALDWELL, RESPONDENT.

No. 53041

May 6, 2010 229 P.3d 471

Appeal from a district court order granting a petition for judicial review in a DUI driver's license revocation action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Licensee sought review of decision of administrative law judge affirming decision of Department of Motor Vehicles revoking her driver's license when only one of two consecutive breath tests to determine the concentration of alcohol in licensee's breath was over the legal limit. The district court reversed. State appealed. The supreme court, DOUGLAS, J., held that revocation statute only required a single breath test to be over the legal limit in order to revoke license.

Reversed.

[Rehearing denied June 21, 2010]

[En banc reconsideration denied October 6, 2010]

Catherine Cortez Masto, Attorney General, and *Binu G. Palal*, Deputy Attorney General, Carson City, for Appellant.

Law Offices of John G. Watkins and *John Glenn Watkins*, Las Vegas, for Respondent.

1. ADMINISTRATIVE LAW AND PROCEDURE.
   The supreme court reviews an administrative decision in the same manner as the district court, reviewing questions of law de novo.
2. STATUTES.
   When statutory language is plain and unambiguous, the supreme court will not look beyond the language to ascertain legislative intent.
3. AUTOMOBILES.
   Statute governing revocation of driver's license due to alcohol concentration being over statutory limit of 0.08 required only a single test result to be over the legal limit in order to revoke license; other statute requiring that two samples be taken for breath test and that the test results be within .02 of each other was merely an evidentiary requirement to validate the test, and language used in license revocation statute was singular. NRS 484.384, 484.386(1).

Before HARDESTY, DOUGLAS and PICKERING, JJ.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we confirm that a single test to determine the concentration of alcohol in a person's breath will require revocation of a driver's license. We conclude that while NRS 484.386(1) requires that two consecutive samples of breath be taken to provide an evidentiary basis for the concentration of alcohol in a person's breath, NRS 484.384 does not require that the two consecutive samples be over the legal limit to mandate revocation; only one valid sample must be over the legal limit in order for the Department of Motor Vehicles (DMV) to revoke a driver's license. The requirements in NRS 484.386(1) that two samples be taken and that the test results be within 0.02 of each other is merely an evidentiary requirement to validate the test.

FACTS

Respondent Aundrea Taylor-Caldwell was pulled over by the Nevada Highway Patrol for suspicion of driving under the influence (DUI), failed a field sobriety test, and was placed under arrest. Taylor-Caldwell was given two consecutive breath tests pur-

suant to NRS 484.386(1), which states that a breath test must consist of two consecutive samples that differ by less than or equal to 0.02 in their determination of the concentration of alcohol in the person's breath. Taylor-Caldwell's first sample was under the legal limit of 0.08 concentration of alcohol in the breath, at 0.073, and her second sample was over the legal limit at 0.083. *See* NRS 484.384.

Pursuant to NRS 484.385, the DMV revoked Taylor-Caldwell's driver's license. Taylor-Caldwell requested an administrative hearing, and the administrative law judge affirmed the revocation of her driver's license, determining that both samples were valid but that the valid sample of 0.083 was substantial evidence that Taylor-Caldwell had a breath alcohol concentration of 0.08 or greater at the time of the test.

Taylor Caldwell then sought judicial review in the district court. The district court granted Taylor-Caldwell's petition and reversed the revocation. The district court concluded that reading NRS 484.384 and NRS 484.386 together makes it clear that both breath samples must be considered in order to establish the concentration of alcohol in a driver's breath. The district court went on to hold that consideration of both breath results ''fails to establish by substantial evidence 'a concentration of alcohol of 0.08 or more in' '' Taylor-Caldwell's breath pursuant to NRS 484.384(1).

DISCUSSION

Standard of review

[Headnotes 1, 2]

This court reviews an administrative decision in the same manner as the district court. *Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 56, 200 P.3d 514, 519-20 (2009). Like the district court, this court reviews questions of law de novo. *Id.* at 56, 200 P.3d at 520. ''It is well established that when statutory language is plain and unambiguous, we will not look beyond the language to ascertain legislative intent.'' *Dutchess Bus. Servs. v. State, Bd. of Pharm.*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008).

Plain meaning of NRS 484.384

[Headnote 3]

Pursuant to NRS 484.384, a person's driver's license must be revoked if the concentration of alcohol in their breath or blood is above the statutory limit of 0.08. Specifically, NRS 484.384(1) provides that ''[i]f the *result of a test* . . . shows that a person had a concentration of alcohol of 0.08 or more in his blood or breath at the time of the test, his license, permit or privilege to drive *must* be revoked.'' (Emphases added.)

The DMV disputes the district court's interpretation of NRS 484.384 and NRS 484.386. The DMV argues that the use of the singular ''result'' and ''test'' in NRS 484.384 indicates a single breath sample is sufficient to prove Taylor-Caldwell's breath was above the legal limit. We agree. NRS 484.384 does not require that both consecutive samples be over the legal limit; only one sample must be over the legal limit. NRS 484.386's requirement that law enforcement obtain two test results within 0.02 of each other is merely an evidentiary requirement to validate the test.

The language used in NRS 484.384(1) is singular. There is nothing in the statute to indicate that ''the result of a test'' means two samples. A single test result over the legal limit is all the statute requires. As the administrative law judge said, ''[n]othing in the statute indicates that both valid samples must be at least 0.08 in order for the Department to consider that the petitioner had a breath alcohol concentration of at least 0.08 at the time of the test.'' We agree; NRS 484.384 does not require both samples to be over the legal limit.

NRS 484.386(1)(a) provides the evidentiary test requirements for determining the concentration of alcohol within an individual's breath stating:

> [A]n evidentiary test of breath to determine the concentration of alcohol in a person's breath may be used to establish that concentration only if two consecutive samples of the person's breath are taken and:
>
> (a) The difference between the concentration of alcohol in the person's breath indicated by the two samples is less than or equal to 0.02.

Generally, the purpose of ensuring that the two consecutive breath samples do not deviate by more than 0.02 of each other is to '' 'better evaluate precision and increase one's confidence in the results for forensic-legal purposes.' '' 2 Richard E. Erwin, *Defense of Drunk Driving Cases* § 18.03(2) (Matthew Bender, 3d ed. 2009) (quoting Rodney G. Gullberg, *Duplicate Breath Testing: Some Statistical Analyses*, 37 Forensic Sci. Int'l 205, 205 (1988)). Moreover, the language used in NRS 484.386(2) supports the conclusion that only one test over the legal limit is required. NRS 484.386(2) provides that, ''[i]f for some other reason a second, third, or fourth sample is not obtained, the results of the first test may be used with all other evidence presented to establish the concentration.'' Certainly, if the Legislature had intended to require two samples over the legal limit to compel license revocation, it would not have permitted the use of other evidence to establish the concentration. Therefore, the purpose of this statutory requirement under NRS 484.386 is to ensure that the breath results are accurate and reliable.

Here, two consecutive breath tests were administered. The result of the first test was 0.073 and the result of the second was 0.083. Because the results of the two breath samples were well within 0.02, the DMV satisfied the evidentiary breath test requirement pursuant to the purpose and plain language of NRS 484.386(1)(a), which was to ensure the accuracy and reliability of the breath results. Therefore, the result of the second test was sufficient to determine the breath alcohol concentration of Taylor-Caldwell.[1]

Because NRS 484.384 does not require that both consecutive samples be over the legal limit, if one valid sample is over the legal limit, the ''permit or privilege to drive must be revoked.'' Accordingly, we reverse the judgment of the district court and uphold the revocation of Taylor-Caldwell's driver's license.

HARDESTY and PICKERING, JJ., concur.

IN RE: LUIS SANDOVAL, DEBTOR.

LESLIE HOWARD, APPELLANT, *v.*
LUIS SANDOVAL, RESPONDENT.

No. 52066

May 13, 2010 232 P.3d 422

Certified question, pursuant to NRAP 5, concerning whether a default judgment entered for failure to file an answer has issue-preclusive effect in a bankruptcy proceeding. United States Bankruptcy Court, District of Nevada; Bruce A. Markell, Judge.

The supreme court held that issue of whether debtor had acted willfully or maliciously was not actually or necessarily litigated, and thus, issue preclusion did not apply.

Question answered.

Sidhu Law Firm, LLC, and *Ambrish S. Sidhu*, Las Vegas, for Appellant.

Crosby & Associates and *David M. Crosby*, Las Vegas, for Respondent.

1. JUDGMENT.

Issue of whether bankrupt judgment debtor had acted willfully or maliciously was not actually or necessarily litigated in assault and battery ac-

---

[1]Taylor-Caldwell did not dispute the validity of either test. Taylor-Caldwell did not challenge the administration of the breath test or the calibration of the machine at the administrative hearing.

tion that resulted in default judgment against debtor, and thus, debtor was not precluded, under the doctrine of issue preclusion, from arguing the issue for purposes of discharge of judgment debt in bankruptcy proceeding; default judgment was entered after summons was served by publication, there was no evidence that debtor had knowledge of the case before the default judgment, and debtor entered no appearance and did not participate in any manner in the assault and battery action. 11 U.S.C. § 523(a)(6).

2. JUDGMENT.
   Issue preclusion prevents relitigation of an issue decided in an earlier action, even though the later action is based on different causes of action and distinct circumstances.
3. JUDGMENT.
   Four factors must be met for issue preclusion to apply: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action, (2) the initial ruling must have been on the merits and have become final, (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation, and (4) the issue was actually and necessarily litigated.
4. JUDGMENT.
   Issue preclusion only applies to issues that were actually and necessarily litigated and on which there was a final decision on the merits.
5. JUDGMENT.
   Issue preclusion serves to avoid relitigation and to conserve judicial resources.
6. JUDGMENT.
   Nevada's issue-preclusion test requires that an issue be actually litigated and not simply that a party had an opportunity to litigate the issue.
7. JUDGMENT.
   When a default judgment is entered where an answer has not been filed, the issue presented was not actually and necessarily litigated, and issue preclusion does not apply in such circumstances.

Before PARRAGUIRRE, C.J., HARDESTY, DOUGLAS, CHERRY, SAITTA, GIBBONS and PICKERING, JJ.

OPINION

Per Curiam:

The certified question in this case asks whether a Nevada default judgment based on a defendant's failure to answer a complaint served by publication carries issue-preclusive effect. Because Nevada law requires an issue to have been actually and necessarily litigated for issue preclusion to apply, a default judgment entered in these circumstances does not carry such effect.

FACTS

The certified question originates in a proceeding before the United States Bankruptcy Court for the District of Nevada to de-

termine the dischargeability of a debt embodied in a Nevada default judgment against respondent Luis Sandoval, the debtor, in favor of Charles O. Ajuziem. The default judgment was based on Ajuziem's complaint, which asserted claims for damages for assault and battery, including punitive damages, arising out of an altercation between Ajuziem and Sandoval at a soccer game. Ajuziem was a referee and Sandoval was a player on a soccer team. According to the complaint, Sandoval verbally threatened Ajuziem and punched Ajuziem in the eye, injuring him. Service of the complaint was accomplished by publication. When Sandoval neither answered nor appeared, the state trial court entered judgment by default. Ajuziem later assigned the judgment to appellant Leslie Howard.

A United States bankruptcy court determines the issue-preclusive effect of a state court judgment by the law of the court that rendered judgment. *In re Cantrell*, 329 F.3d 1119, 1123 (9th Cir. 2003). Section 523(a)(6) of the Bankruptcy Code provides that a debt is nondischargeable if it is ''for willful and malicious injury by the debtor to another entity or to the property of another entity.'' 11 U.S.C. § 523(a)(6) (2006). The issue-preclusive effect of the state court default judgment against Sandoval became an issue in Sandoval's bankruptcy proceeding when Howard objected to discharge of the judgment under 11 U.S.C. § 523(a)(6). Howard moved for summary judgment, contending that the default judgment established that Sandoval had acted willfully and maliciously, leaving nothing to litigate. Sandoval asserts that issue preclusion should not apply because he was not personally served with the complaint, no evidence was presented in the prior case, and the default judgment did not result in any specific findings of fact.

Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 194 P.3d 709 (2008), materially clarified Nevada law respecting issue and claim preclusion. It does not, however, answer the narrow question presented to and certified by the bankruptcy court in this case:

> Under Nevada law, would a default judgment obtained after a failure to answer a properly served complaint for tortious assault and battery have preclusive effect in a later lawsuit in which any of the necessary elements of tortious assault and battery were at issue? Put another way, is such a Nevada default judgment considered ''actually . . . litigated'' within the meaning of the fourth factor of Nevada's issue preclusion doctrine as announced in *Five Star Capital*?

This question meets the criteria specified in NRAP 5 for this court to accept and answer a question of law certified to it by a federal court. *See Volvo Cars of North America v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006).

DISCUSSION

[Headnotes 1-4]

Issue preclusion prevents relitigation of an issue decided in an earlier action, even though the later action is based on different causes of action and distinct circumstances. *Five Star*, 124 Nev. at 1055, 194 P.3d at 713-14. Four factors must be met for issue preclusion to apply:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated.

Id. at 1055, 194 P.3d at 713 (alteration in original) (internal quotation and citation omitted). As we emphasized in *Five Star*, ''issue preclusion only applies to issues that were *actually and necessarily litigated* and on which there was a final decision on the merits.'' *Id*. (emphasis added). Because Howard seeks to establish willful and malicious injury for dischargeability purposes based on the Nevada state court default judgment awarding tort and punitive damages for assault and battery, issue preclusion is at issue and our focus is on the ''actually and necessarily litigated'' requirement in *Five Star*.

Courts elsewhere are divided on whether and when a default judgment can establish issue preclusion. Most courts hold that issue preclusion is not available for a default judgment obtained based simply on a defendant's failure to file an answer. *See Arizona v. California*, 530 U.S. 392, 414 (2000); *Matter of Gober*, 100 F.3d 1195, 1203-06 (5th Cir. 1996) (applying Texas law); *U.S. v. Ringley*, 750 F. Supp. 750, 759 (W.D. Va. 1990); *Wall v. Stinson*, 983 P.2d 736, 740 (Alaska 1999); *Circle K v. Industrial Com'n*, 880 P.2d 642, 645 (Ariz. Ct. App. 1993); *Gottlieb v. Kest*, 46 Cal. Rptr. 3d 7, 33-34 (Ct. App. 2006) (recognizing, although declining to follow, this rule); *Treglia v. MacDonald*, 717 N.E.2d 249, 253-54 (Mass. 1999).[1] These courts reason that when a de-

---

[1]We note that some of these same courts, which do not allow issue preclusion based on a default judgment where no answer was filed, recognize the possibility of issue preclusion for other types of default judgments, such as a default judgment based on abusive or dilatory litigation tactics. *See Matter of Gober*, 100 F.3d 1195, 1203-06 (5th Cir. 1996) (applying Texas law and following a flexible approach, wherein generally issue preclusion should not apply to default judgments but recognizing that it may be available in cases where default is entered after an answer is filed for failure to participate at trial or as a sanction for improper delay

fault judgment is entered based on failure to answer, issue preclusion is not available because the issues raised in the initial action were never actually litigated. This reasoning comports with the Restatement (Second) of Judgments, section 27, which states that ''[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'' Restatement (Second) of Judgments § 27 (1982). When a judgment is entered by confession, consent, or default, none of the issues is actually litigated, and therefore, the issues may be litigated in a subsequent action. *Id.* cmt. e.

Other courts follow a more relaxed view of issue preclusion based on default judgments, finding that if the party had a fair opportunity to litigate the issues and/or if the court made express findings in its default judgment, issue preclusion is appropriate. *See, e.g.*, *In re Cantrell*, 329 F.3d 1119, 1124 (9th Cir. 2003) (applying California law); *Gottlieb v. Kest*, 46 Cal. Rptr. 3d 7, 33-34 (Ct. App. 2006); *Jackson v. R.G. Whipple, Inc.*, 627 A.2d 374, 380 (Conn. 1993), *abrogated on other grounds by Macomber v. Travelers Property & Cas. Corp.*, 804 A.2d 180 (Conn. 2002); *TransDulles Center, Inc. v. Sharma*, 472 S.E.2d 274, 276 (Va. 1996). These courts interpret the requirement of ''actually litigated'' to mean a fair opportunity to litigate, *Cantrell*, 329 F.3d at 1124; *Jackson*, 627 A.2d at 380, or hold that if the court made express findings, then the issues were actually litigated and there is no requirement that the party have participated in the case. *Sharma*, 472 S.E.2d at 276. This view does not make the issue-preclusive effect of a default judgment depend on whether the defendant filed an answer but instead on whether the defendant had an opportunity to participate and/or whether the court entering the default made findings to support the default judgment.

[Headnote 5]

Issue preclusion serves to avoid relitigation and to conserve judicial resources. However, *Five Star*'s requirement that an issue has been ''actually and necessarily litigated'' before issue preclusion will attach serves important competing concerns with fairness. As

---

or nonparticipation in the case); *Treglia v. MacDonald*, 717 N.E.2d 249, 253-54 (Mass. 1999) (adopting a general rule that a default judgment does not provide issue-preclusive effect because the issues are not actually litigated but recognizing circumstances in which issue preclusion based on a default judgment could apply, such as when ''a litigant may so utilize our court system in pretrial procedures, but nonetheless be defaulted for some reason, that the principle and rationale behind [issue preclusion] would apply''). We do not reach this issue, as it is not raised in the certified question.

comment e to the Restatement (Second) of Judgments, section 27 recognizes, there are a number of legitimate reasons why a party may not have previously litigated an issue: the party did not receive actual notice of the proceedings, ''[t]he action may involve so small an amount that litigation of the issue may cost more than the value of the lawsuit[,] . . . [o]r the forum may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all.'' And as comment e points out, the policies behind issue preclusion ''of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party'' are not as compelling in a default judgment setting, as here, because the issues have not actually been litigated.

[Headnotes 6, 7]

For these reasons we conclude that Nevada's issue-preclusion test requires that an issue be ''actually litigated'' and not simply that a party had an opportunity to litigate the issue. *Five Star*, 124 Nev. at 1056, 194 P.3d at 714. When a default judgment is entered where an answer has not been filed, the issue presented was not actually and necessarily litigated, and issue preclusion does not apply in such circumstances. Here, the default judgment was entered after the summons was served by publication. There is no evidence that Sandoval had knowledge of the case before the default judgment. Sandoval entered no appearance and did not participate in any manner in the prior case. The district court's judgment does not make any specific findings of fact that were established through evidence. Under these circumstances, the issues were not ''actually and necessarily litigated'' and the default judgment cannot provide a basis for issue preclusion.

BOBBIE THOMAS, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JESSE RAY THOMAS; AND BRANDI LIN THOMAS, APPELLANTS, *v.* WAYNE HARDWICK, M.D.; NORTHERN NEVADA EMERGENCY ROOM PHYSICIANS; AND WASHOE MEDICAL CENTER, RESPONDENTS.

No. 48329

May 27, 2010 231 P.3d 1111

Appeal from a district court judgment on a jury verdict in a wrongful death action. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Widow brought wrongful death action against physician and medical center, alleging that physician's negligence caused husband's heart attack and death. Following jury trial, the district court entered judgment for physician and medical center. Widow appealed. The supreme court, PICKERING, J., held that: (1) trial court did not abuse its discretion in permitting prospective jurors to be asked about their attitudes on medical malpractice; (2) physician's testimony was admissible under habit evidence rule; (3) trial court did not abuse its discretion by failing to order severe sanctions against medical center; and (4) assuming trial court impermissibly admitted expert testimony concerning ''recall bias,'' such error was harmless.

Affirmed.

CHERRY, J., dissented in part.

Osborne, Ohlson & Hall, Chtd., and *Ann O. Hall* and *John Ohlson*, Reno, for Appellants.

Lemons Grundy & Eisenberg and *Alice Campos Mercado*, Reno, for Respondents Hardwick and Northern Nevada Emergency Room Physicians.

Piscevich & Fenner and *Margo Piscevich*, Reno, for Respondent Washoe Medical Center.

Burris, Thomas & Springberg and *Andrew Thomas*, Las Vegas, for Amicus Curiae Nevada Justice Association.

1. JURY.

Trial court did not abuse its discretion in permitting prospective jurors on voir dire to be questioned with regard to their attitudes and feelings regarding medical malpractice cases, in widow's wrongful death action against physician and medical center arising out of physician's alleged malpractice in treating husband; widow declined chance to submit any

specific voir dire questions on her own to trial court and failed to have voir dire transcribed.

2. APPEAL AND ERROR.
   Widow's challenge on appeal to voir dire questions regarding tort reform in her wrongful death action against physician and medical center was not barred by ''invited error doctrine''; widow acted promptly to disabuse physician and medical center of any misconception that they had as to intended scope of widow's omnibus motion in limine to prohibit all reference to tort reform.
3. APPEAL AND ERROR; JURY.
   The scope of voir dire rests within the sound discretion of the district court, whose decision will be given considerable deference by the supreme court.
4. EVIDENCE.
   Physician's testimony, that he had habit and routine of counseling emergency room patients to be admitted to medical center for observation and further testing when experiencing unexplained chest pains of nonmuscular origin, was admissible under rule permitting admission of evidence of habit if adequate foundation was provided, in widow's wrongful death action against physician and medical center; testimony was legitimate circumstantial evidence that physician counseled widow's husband to be admitted, as physician's dictated notes recorded. NRS 48.059(1).
5. EVIDENCE; TRIAL.
   Trial courts have considerable discretion in determining the relevance and admissibility of evidence.
6. PRETRIAL PROCEDURE.
   Trial court did not abuse its discretion in permitting widow to introduce evidence of medical center's negligent loss of original medical chart of husband rather than ordering more severe preclusive sanctions against medical center, such as adverse inference instruction, in widow's wrongful death action against physician and medical center, where original chart was copied early on, copy was accepted by all parties as authentic, widow offered only argument, rather than evidence, to suggest stipulated master copy was not exact duplicate of original, widow made no motion to compel inspection of original, and widow denied court-offered continuance to pursue discovery into lost original.
7. PRETRIAL PROCEDURE; TRIAL.
   A trial court's decision on whether to impose sanctions, including an adverse inference instruction, for the destruction or spoliation of evidence, is committed to the trial court's discretion.
8. APPEAL AND ERROR.
   Widow failed to preserve for appeal argument that trial court erred in permitting expert witness to testify regarding widow's alleged ''recall bias,'' in her wrongful death action against physician and medical center, where widow failed to make contemporaneous objection to such testimony during trial. NRS 47.040(1)(a).
9. APPEAL AND ERROR.
   The failure to specifically object on the grounds urged on appeal precludes appellate consideration on the grounds not raised below. NRS 47.040(1)(a).
10. APPEAL AND ERROR.
    Assuming trial court impermissibly admitted expert witness's testimony regarding widow's alleged ''recall bias'' on ground that such testimony invaded province of jury with regard to widow's credibility as witness, trial court's error was harmless, in widow's wrongful death action

against physician and medical center; reason to question widow's memory existed separate and apart from expert's testimony.

11. APPEAL AND ERROR.

Supreme court would not consider on appeal widow's argument that trial court improperly dismissed, on basis of statute of limitations, amended complaint that named daughter as additional party plaintiff, in widow's wrongful death action against physician and medical center, notwithstanding widow's challenges to dismissal on constitutional and ''relation back'' grounds, inasmuch as district court did not reach merits of issue and circumstances of case did not require court to reach constitutionality of issue. NRS 41A.097(4).

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

Bobbie Thomas appeals from a judgment entered on a defense verdict in her wrongful death suit against Dr. Wayne Hardwick, his practice group, and Washoe Medical Center. Her suit alleges that medical malpractice led to her husband's preventable heart attack and death two weeks after Dr. Hardwick saw him for chest pain complaints in WMC's emergency room. On appeal, Thomas asserts that errors by the trial court in managing voir dire, admitting certain evidence, and not imposing meaningful sanctions on WMC for its negligent loss of evidence deprived her of a fair trial. Separately, she appeals the trial court's dismissal on statute-of-limitations grounds of the amended complaint by which her daughter, Brandi, sought to join the suit as an additional named plaintiff.

Not all the errors claimed are properly before this court. Those that are permit reversal and a new trial only if an abuse of discretion affecting substantial rights is shown. Because that showing has not been made, we affirm.

I.

Jesse ''Ray'' Thomas had undetected, advanced-stage coronary artery disease. On January 13, 2003, two weeks before his fatal heart attack, he went to WMC's emergency room, complaining of chest pains and sweatiness. The electrocardiogram and troponin tests Dr. Hardwick ran ruled out recent heart attack but not cardiovascular disease as the cause of his symptoms. The core question at trial was what Dr. Hardwick told Mr. Thomas when he saw him in the emergency room on January 13. Did Ray Thomas leave the hospital that day against medical advice, as respondents WMC and Dr. Hardwick maintain? Or was Ray Thomas told he was ''fit as a fiddle'' and could safely leave, as appellant Bobbie Thomas maintains?

The evidence at trial was that Ray Thomas's heart disease may have been treatable if it had been diagnosed earlier. The tests run in the emergency room did not rule out cardiovascular disease, which Mr. Thomas's chest pains and other symptoms suggested he might have. The standard of care required Dr. Hardwick to counsel Mr. Thomas to agree to be admitted to the hospital for observation and testing, especially since Mr. Thomas's history disclosed he had no regular primary care physician.

A copy of Mr. Thomas's hospital chart was authenticated in discovery and used at trial.[1] The chart reflects that he left the emergency room on January 13, 2003, against medical advice or ''AMA.'' It contains an order by Dr. Hardwick directing hospital staff to ask Mr. Thomas to sign an AMA release, but no signed release was ever produced. Dr. Hardwick sees thousands of patients each year and could not recall Mr. Thomas specifically. Based on his dictated chart notes and customary practice in treating chest pain patients, Dr. Hardwick testified that he urged Mr. Thomas to be admitted for observation and testing but he refused. An attending nurse gave similar testimony about her handwritten chart notes, which said the patient was ''refusing to be admitted. M.D. aware.''

Bobbie Thomas disputed this evidence. She testified that she came to the emergency room with her husband and sat in on his conversations with Dr. Hardwick. She remembered Dr. Hardwick saying that, while he normally urged chest pain patients to be admitted, her husband's preliminary test results were good enough for him to go home, so long as he followed up promptly with a private physician. A family member arrived as the Thomases were preparing to leave. He recalled Ray Thomas saying, within earshot of Dr. Hardwick, who said nothing, that the doctor had told him he was lucky and could safely leave.

Mr. Thomas's symptoms subsided before he left the emergency room. Hospital staff gave the Thomases papers suggesting he follow up with a personal physician and return to the emergency room immediately if his chest pains recurred or he experienced unusual sweating or problems breathing. One form warned that chest pain could indicate a life-threatening condition; another provided names and addresses of follow-up health care options. A fellow worker testified that Mr. Thomas complained about not feeling well the day before his fatal heart attack. However, Mr. Thomas did not seek further medical care after leaving the emergency room beyond calling several physicians' offices to ask about possible care.

Trial lasted five days. The parties presented a number of witnesses, including experts. After deliberating for less than

---

[1]After copying the original chart at Bobbie Thomas's request and consulting it to answer interrogatories, WMC lost the original of Ray Thomas's emergency room chart. This became the basis for the sanctions proceedings that are discussed *infra*, at section II.C.

two hours, the jury returned a unanimous verdict finding no negligence.

II.

A. *Voir dire*

[Headnotes 1, 2]

Thomas's first assignment of error concerns voir dire about tort reform. The ruling Thomas complains about originated in an omnibus motion in limine that Thomas herself filed. In it, Thomas moved for an order prohibiting ''[a]ny and all reference, mention or citation to Tort Reform or 'Keep our Doctors in Nevada' '' on the grounds these ''are highly politicized topics . . . which do not have any bearing upon the ultimate issues in this trial.''[2] Both WMC and Dr. Hardwick filed statements of nonopposition, agreeing with Thomas. Correcting her motion, Thomas filed a short reply asking to carve voir dire out of her proposed order in limine regarding tort reform.[3]

The issue came up briefly at the first of two pretrial conferences. At the conference, WMC offered the view that, ''If [Thomas's lawyers] want to ask [prospective jurors] generally, do you have a problem in a malpractice case, do you believe that people can legitimately bring a malpractice case[ ], . . . I don't have a problem with it.'' But, WMC argued, ''it's totally inappropriate to ask somebody how they voted on a referendum, and what they thought about the Keep our Doctors in Nevada referendum.''[4] The

---

[2]''Keep Our Doctors in Nevada'' or ''KODIN'' refers to a ballot initiative (the parties use referendum and initiative interchangeably, although initiative is the correct term) that voters passed in 2004 to limit medical malpractice claims. The initiative's changes to Nevada's medical malpractice law are codified in NRS Chapter 41A.

[3]We reject respondents' argument that the ''invited error'' doctrine bars Thomas's voir dire challenge. Thomas acted promptly to disabuse WMC and Dr. Hardwick of any misconception they had as to the intended scope of her motion in limine, and the district court went on to address Thomas's concern with having the blanket order in limine she had requested apply to voir dire. This distinguishes ''invited error'' cases like *Pearson v. Pearson*, 110 Nev. 293, 871 P.2d 343 (1994), in which the invited error was not timely and forthrightly corrected in the trial court.

[4]NRS 49.315 provides, ''Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.'' Potential jurors do not surrender their rights as citizens on receipt of a summons calling them to jury duty. Even in an election law case, ''[i]nquiry about political opinions and associations'' has been held off limits unless ''the particular juror had given some reason to believe, by his conduct or declarations, that he would regard the case as involving the interests of political parties rather than the enforcement of the law.'' 2 Charles Alan Wright, *Federal Practice and Procedure* § 382, at 513-14 (3d ed. 2000) (discussing *Connors v. United States*, 158 U.S. 408 (1895)).

district court partially agreed, cautioning the lawyers that it did not ''want references to voting, to tort reform, [or] to Keep our Doctors in Nevada'' in general voir dire. However, this was neither the blanket prohibition nor definitive ruling Thomas makes it out to be. The district court urged the lawyers instead to

> . . . [g]et it closer to the facts of this case. Do you have any strong feelings one way or the other about people who sue their doctor or their hospital and the claim that the doctor and the hospital caused them injury, the damage[?] Anybody who, for whatever reason in their life would not be able to be fair and impartial and listen to all the testimony[?] Those types of questions are fine.

By prior order, the district court had deferred final ruling on voir dire about medical malpractice reform ''until filing of pre-trial statements and proposed *voir dire* questions.'' She reiterated that her final ruling would depend on the specific voir dire questions the lawyers proposed in their written pretrial statements:

> . . . if there's some questions that you feel are important to the fact pattern, if you put them in your pretrial statement . . . I will read those, and then we can talk about them or modify them as the Court might deem necessary.

The judge also invited sidebars at trial: ''[I]f something comes up in jury selection, and any of you feel that there's a burning question that has to be asked that's a little bit broader, a little more political, ask for a sidebar, and we can talk about it.''

This is all there is in the record on voir dire. No final written order was entered, the voir dire wasn't transcribed, and the appendix does not include the pretrial statements or any proposed written voir dire. The record contains no copies of advertisements or literature about medical malpractice tort reform, to which the venire might have been exposed, or proof of when and to what extent such literature was disseminated. At oral argument, Thomas's counsel acknowledged that she did not prepare and submit any proposed voir dire questions concerning medical malpractice reform, despite the district court's request for them.

Appellant has the responsibility to order the transcripts and assemble the record needed to decide the issues raised on appeal. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (citing NRAP 30(b)(3)). Not having voir dire transcripts hamstrings our review. *See Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (declining to review an order refusing sequestered voir dire when the relevant transcripts were not ordered; if ''the record on appeal . . . [does not] contain[ ] the material to which [the objecting party takes] exception . . . , the missing portions . . . are presumed to support the district court's

decision''), *reversed on other grounds Riggins v. Nevada*, 504 U.S. 127 (1992). Adhering to *Riggins*, we presume that the venire was asked the question the district court suggested (''Do you have any strong feelings one way or the other about people who sue their doctor or their hospital and the claim that the doctor and the hospital caused them injury?''), the related questions defense counsel suggested (''[D]o you have a problem in a malpractice case?''; ''[D]o you believe that people can legitimately bring a malpractice case[ ]?''), and all appropriate follow-up.

[Headnote 3]

In Nevada, the right to attorney voir dire is secured by statute. NRS 16.030(6), *discussed in Whitlock v. Salmon*, 104 Nev. 24, 752 P.2d 210 (1988). The scope of voir dire nonetheless ''rests within the sound discretion of the district court, whose decision will be given considerable deference by this court.'' *Johnson v. State*, 122 Nev. 1344, 1354-55, 148 P.3d 767, 774 (2006). Cases elsewhere have taken varying positions on whether, to what extent, and when voir dire on tort reform and/or ''the insurance crisis'' is proper. *See* Richard L. Ruth, Annotation, *Propriety of Inquiry on Voir Dire as to Juror's Attitude Toward, or Acquaintance With, Literature Dealing With, Amount of Damage Awards*, 63 A.L.R. 5th 285 § 8 (1998 & Supp. 2010). The Utah, Idaho, and Pennsylvania cases on which Thomas relies do not license unlimited voir dire on medical malpractice reform, however. On the contrary, they support the parameters the district court set in this case—asking for specific questions to be submitted and justified, offering individual or even sequestered voir dire, and asking that the parties first explore jurors' general views on people who sue hospitals or doctors rather than framing the issue initially in political terms. These are all measures Thomas's cases permit, even encourage.[5]

Consider *Barrett v. Peterson*, 868 P.2d 96 (Utah Ct. App. 1993), for example. There, the plaintiffs lodged specific advertisements disseminated recently in the trial venue touting ''tort-reform'' and submitted 82 specific proposed voir dire questions, 11 of which were designed to elicit whether the venire had seen the ads and if so, what their feelings about them were. *Id.* at 97, 101. The trial court refused to permit these questions or, indeed, to

---

[5]We decline to adopt the rule stated in *Landon v. Zorn*, 884 A.2d 142 (Md. 2005), *abrogated on other grounds by McQuitty v. Spangler*, 976 A.2d 1020 (Md. 2009), on which WMC and Dr. Hardwick rely. Maryland follows a different approach to attorney voir dire than Nevada. In Maryland, attorney voir dire is limited to establishing bases for challenges for cause; '' 'it does not encompass asking questions designed to elicit information in aid of deciding on peremptory challenges.' '' *Id.* at 147 (quoting *Couser v. State*, 383 A.2d 389, 397 (Md. 1978)). Nevada recognizes that attorney voir dire legitimately informs a party's peremptory challenges. *Whitlock*, 104 Nev. at 28, 752 P.2d at 212-13.

allow the parties to even ''verbalize the concept of lawsuits against doctors prompting discernible emotions.'' *Id*. at 103. This complete ban, the Utah court of appeals properly held, was error. *Id*. at 96.

In *Kozlowski v. Rush*, 828 P.2d 854 (Idaho 1992), by contrast, the plaintiffs failed to make a record that the jury venire likely had been exposed to assertedly widespread, current, but undocumented advertisements about a ''medical malpractice crisis.'' *Id*. at 862-63. Had such exposure been documented, questions concerning individual juror's attitudes could have been appropriate. *Id*.[6] Since reversal was ordered for unrelated reasons, the court told the plaintiff to lay a proper foundation if she wished to explore attitudes toward malpractice reform on retrial. *Id*.

And the Pennsylvania case of *Capoferri v. CHOP*, 893 A.2d 133 (Pa. Super. Ct. 2006), was clarified in *Wytiaz v. Deitrick*, 954 A.2d 643 (Pa. Super. Ct. 2008). There, as here, the voir dire transcript was not available, but the record suggested that the trial judge planned to ask the venire for its opinions on civil damage suits and people who sue or are sued in medical malpractice cases. *Deitrick*, 954 A.2d at 647. Given that the potential jurors were asked ''whether they had any specific beliefs about medical malpractice lawsuits or the parties involved in such litigation,'' *id*. at 648, the appellants' complaint that they didn't get the specific phraseology they wanted failed. Also significant in *Wytiaz*: the appellants ''do not assert that they were prevented from questioning further any potential juror who answered one or more of the standard voir dire questions in a manner which might prompt additional inquiry.'' *Id*.

Based on the actual record, as distinguished from the parties' speculative characterizations of it, we find no abuse of discretion. Presumably, the district judge asked the venire the questions she said she planned to ask about ''people who sue their doctor or their hospital and the claim that the doctor and the hospital caused them injury.'' Since Thomas did not submit any specific voir dire questions or have voir dire transcribed, we have no way of knowing whether the district court would have allowed the related question of whether the venire had been exposed to media on the subject of ''people who sue their doctor or their hospital,'' assuming an adequate predicate was laid. *See supra* note 6. On this record, we assume the court did. What is presented, then, is a challenge to the district court's ''failure to formulate more detailed questions

---

[6]Thomas did not submit any literature, initiative materials, or ads the jury may have been exposed to. The defense argued that the ballot initiative predated the trial by two years and people likely had no current memory of it. Without any concrete examples or proof—and no transcript of voir dire—the court has no way to assess the venire's exposure to tort reform literature except anecdotally.

on its own,'' after counsel declined—''hardly an abuse of discretion.'' *Chlopek v. Federal Ins. Co.*, 499 F.3d 692, 702 (7th Cir. 2007).

B. *Habit evidence*

[Headnote 4]

Dr. Hardwick testified that he has worked in WMC's emergency room since 1980, through which approximately 70,000 patients pass each year. This works out to 200 patients a day of which, on average, one patient a day presents with chest pain complaints. While Dr. Hardwick did not remember seeing Ray Thomas on January 13, 2003, his hospital chart was in evidence. Dr. Hardwick testified to what the chart recorded, including his dictated notes stating that he urged Mr. Thomas to be admitted for further tests but Mr. Thomas refused. Over objection, Dr. Hardwick testified that he routinely urges patients with chest pain complaints and inconclusive test results like Mr. Thomas's to be admitted and that he routinely records this advice in dictation, as he did here. The attending emergency room nurse gave similar testimony about her handwritten chart notes. She testified without separate objection that in the 12 years she had worked with Dr. Hardwick in the emergency room, he ''admits everyone'' who presents with symptoms like Mr. Thomas's.

Thomas challenges the district court's admission of this evidence, citing NRS 48.059(1), but does not cogently establish error. NRS 48.059(1) provides that

> [e]vidence of the habit of a person or the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.[7]

Like many courts, ''[w]e are cautious in permitting the admission of habit or pattern-of-conduct evidence under [NRS 48.059 or its federal analogue] Rule 406 because it necessarily engenders the very real possibility that such evidence will be used to establish a party's propensity to act in conformity with its general character,'' in violation of NRS 48.045, and may involve ''collateral inquiries [that] threaten the orderly conduct of trial while potentially color-

---

[7]Although NRS 48.059(1) replicates Fed. R. Evid. 406, Nevada added subsection 2 from the draft Model Rules, which the Federal Rules omit. NRS 48.059(2) provides, ''Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.''

ing the central inquiry and unfairly prejudicing the party against whom they are directed.'' *Simplex, Inc. v. Diversified Energy Systems, Inc.*, 847 F.2d 1290, 1293 (7th Cir. 1988). Nonetheless, NRS 48.059(1) deems evidence of habit or routine relevant and admissible to prove an act in conformity with the habit or routine, provided an adequate foundation is laid. For a general discussion of the different legislative approaches to habit evidence see 1 *McCormick on Evidence* § 195 (6th ed. 2006). The foundation requires that specific, recurring stimuli have produced the same specific response often and invariably enough to qualify as habit or routine. *Id*. § 195, at 784.

''Courts in many jurisdictions have allowed evidence of a medical practitioner's routine practice as evidence relevant to what the practitioner did on a particular occasion.'' *Aikman v. Kanda*, 975 A.2d 152, 164 (D.C. 2009) (collecting cases); *see* Annotation, *Propriety, in Medical Malpractice Case, of Admitting Testimony Regarding Physician's Usual Custom or Habit in Order to Establish Nonliability*, 10 A.L.R. 4th 1243 (1981). Proof that Dr. Hardwick, when confronted with an emergency room patient experiencing unexplained chest pains of nonmuscular origin, routinely counsels the patient to be admitted to the hospital for observation and further testing was relevant, as was his habit of dictating multiple chart notes over the course of a patient's visit to the emergency room. This was legitimate circumstantial evidence that, consistent with Dr. Hardwick's routine, he counseled Mr. Thomas to be admitted to the hospital, as his dictated notes record. *See Bloskas v. Murray*, 646 P.2d 907, 911 (Colo. 1982).

[Headnote 5]

''Trial courts have considerable discretion in determining the relevance and admissibility of evidence.'' *Atkins v. State*, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996), *overruled on other grounds by McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004). Although NRS 48.059(1) dispenses with the one-time common law requirement of corroboration, the fact the chart notes corroborate Dr. Hardwick's testimony as to his habit and routine makes Thomas's challenge to his testimony an especially hard sell. Much of Dr. Hardwick's testimony dealt with the chart notes as past recollection recorded evidence under NRS 51.125(2). To the extent Dr. Hardwick matched his recorded notes to the habit or routine they were shorthand for, the district court did not abuse its discretion in this case in admitting the testimony under NRS 48.059(1). *Atkins*, 112 Nev. at 1127, 923 P.2d at 1123 (reversal based on error in the admission or exclusion of evidence inappropriate absent ''clear abuse'' of discretion).

C. *Sanctions for lost original chart*

[Headnotes 6, 7]

Thomas next challenges the district court's refusal to impose preclusive or other significant sanctions on WMC for its negligence in having lost the original paper version of the emergency room chart. ''[A] trial court's decision on whether to impose sanctions—including an adverse inference instruction—for the destruction or spoliation of evidence, is committed to the trial court's discretion.'' *Bass-Davis v. Davis*, 122 Nev. 442, 447, 134 P.3d 103, 106 (2006).

> [I]f the district court, in rendering its discretionary ruling on whether to give an adverse inference instruction [or to impose other sanctions] ''has examined the relevant facts, applied a proper standard of law, and, utilizing a [demonstrably] rational process, reached a conclusion that a reasonable judge could reach,'' affirmance is appropriate.

Id. at 447-48, 134 P.3d at 106 (quoting *Garfoot v. Fireman's Fund Ins. Co.*, 599 N.W.2d 411, 416 (Wis. Ct. App. 1999)).

Some background helps give context to the sanctions dispute. Everyone, including Thomas, recognized the importance of the emergency room chart. Thomas obtained a copy of the chart from WMC before discovery and produced it at the early case conference. In the early case conference report, the parties agreed to Bates-number and use Thomas's copy of the chart as a master exhibit. In deposition, the individuals who made entries to the chart authenticated them. Although Thomas served requests for production on WMC that, if enforced, would have called for WMC to produce the original chart for inspection and fresh copying, to which WMC responded, no inspection occurred and no motion to compel was ever filed. The first firm trial date was continued to accommodate a conflict in Thomas's expert's calendar. Before the continuance, all parties had advised the court they were prepared to proceed with trial.

Just two weeks before the already-continued trial was set to begin, Thomas filed a motion to strike the defendants' pleadings and/or to exclude the master exhibit copy of the chart as evidence at trial. Thomas based her motion on an exchange of letters between WMC's and Thomas's lawyers, sent after discovery closed and the original trial had been continued, in which Thomas asked to see the original paper chart and WMC said it searched but could not find it. WMC attested to its practice of creating an electronic copy of its emergency room chart entries by scanning them at the end of each day. The hospital still had the electronic copies of the chart notes for January 13, 2003. Its risk manager had compared them to the original paper chart in 2005 when he verified WMC's

answers to Thomas's interrogatories and said the copies were the same.

At the hearing that followed, the court offered Thomas a trial continuance to develop what it deemed the speculative assertion that the paper original might differ from the master exhibit copy. Thomas declined the offered continuance. Over WMC's objection, the court ruled that Thomas could raise WMC's loss of the paper original as an issue at trial and, to facilitate that, ordered WMC to make its records custodian available to Thomas as a trial witness. Beyond these measures, the court denied further relief. The court based its decision on the fact that WMC had provided Thomas with a copy of the original chart early on; Thomas's delay in raising the issue, which the court took to mean Thomas herself saw no need to double check the master exhibit copy against the original; and the prejudice and confusion any other sanction would cause to WMC's co-defendant, Dr. Hardwick, who had never had custody of the original paper chart.

The district court did not abuse its discretion in declining preclusion sanctions and the adverse inference instruction Thomas proposed. The court in *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 23 (1st Cir. 1981), faced similar competing policy concerns. In *Allen Pen*, one party sought a preclusion order and/or adverse inference instruction based on its opponent's destruction of certain documents after consulting them to answer interrogatories. *Id.* Unlike this case, where the chart was copied and the copies authenticated before the paper original was lost, no duplicates survived in *Allen Pen* (though the information could have been re-created in discovery from third parties). *Id.* As here, the sanctions proponent did not push to see the original documents or bring the matter to the trial court's attention until just before trial and then sought what amounted to liability-determining sanctions and/or an adverse inference instruction. *Id.* The district court denied the motion and the court of appeals affirmed. *Id.* at 23-24. It held that, under the circumstances, the sanctions proponent ''seeks far too draconian a sanction. . . . Having failed to seek lesser remedies, it cannot wait for trial and then seek close to a declaration of victory on the issue.'' *Id.* at 23; *see JOM, Inc. v. Adell Plastics, Inc.*, 193 F.3d 47, 49-50 (1st Cir. 1999) (upholding order denying sanctions for destroyed evidence where the proponent delayed raising the issue until the eve of trial); *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999) (a party who waits an unreasonable period of time before moving to enforce discovery waives enforcement remedies).

This case presents a stronger case against reversal for failure to impose adequate sanctions than either *Allen Pen* or *Bass-Davis*. Here, the original chart was copied early on. All parties accepted

the copy as authentic. Thomas offered no evidence, only argument, to suggest the stipulated master exhibit copy was not an exact duplicate of the paper original; no motion to compel inspection of the original was made; Thomas, as the sanctions proponent, was not forced to trial minus otherwise unavailable evidence. As the trial court found, all parties, including Thomas, had agreed from the beginning that the master exhibit copy was authentic and Thomas had nothing to say it wasn't. *Compare Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (sanctions proponent proved the evidence had been materially altered, making it fair to assume other undetected alterations had occurred; with the ''original'' effectively unavailable, claim-terminating sanctions were appropriate whether or not ''preceded by less severe sanctions''), *with Bass-Davis*, 122 Nev. at 446, 449, 455, 134 P.3d at 105, 107-08, 111 (reversing for failure to give an adverse inference instruction where a videotape was lost without being copied and noting that in that circumstance an adverse inference instruction is appropriate to '' 'restor[e] the evidentiary balance' '' (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991))).[8] Although the court offered Thomas a continuance so she could pursue discovery into the lost original and whether it might have varied from the electronic and other copies available, Thomas rejected this option. *Cf. DesRosiers v. Moran*, 949 F.2d 15, 22 (1st Cir. 1991) (declining to reverse order denying sanctions when the proponent elected to proceed to trial). Under these circumstances, the district court did not abuse its discretion in allowing Thomas to introduce evidence of WMC's negligent loss of the original chart but finding that more severe sanctions were unwarranted because waived.

D. *Expert testimony/recall bias*

Thomas's final assignment of trial error concerns the general ''recall bias'' testimony presented by WMC's expert, Edward Panacek, M.D., M.P.H.[9] We reject this claim of error for two reasons. First, Thomas makes a different objection on appeal than the one she made—indeed, prevailed on—at trial. Second, even if error occurred in connection with Dr. Panacek's general testimony about recall bias, it does not rise to the level required to reverse.

'' 'Recall bias' refers to the human tendency, when confronted with [a] rare outcome, such as the development of autism [after a

---

[8]Thomas also argues that the district court should have sanctioned WMC for its inability to produce a signed AMA release. However, unlike the chart, there was no evidence the AMA release ever existed in signed form.

[9]Dr. Panacek was designated primarily as an expert on emergency room medicine, a subject in which he is board certified and teaches. He also holds a Master's Degree in Public Health, with a subspecialty in epidemiology, which he also teaches. ''Recall bias'' is germane to epidemiology.

child is vaccinated], to recall with greater frequency or clarity events which may explain the outcome.'' *Hendrix v. Evenflo Co., Inc.*, 255 F.R.D. 568, 601 n.62 (N.D. Fla. 2009). While expert testimony on recall bias has been permitted in the context of epidemiological challenges to the validity of retrospective public health studies, *see Colon v. Abbott Laboratories*, 397 F. Supp. 2d 405, 409-10 (E.D.N.Y. 2005), we have found no published case approving its admission on individual witness credibility, and *Nichols v. American National Insurance Co.*, 154 F.3d 875, 882-83 (8th Cir. 1998), persuades us that such use of recall bias testimony invades the province of the jury and seems unhelpful.[10] We thus decline respondents' invitation to equate recall bias testimony with the cross-cultural eyewitness identification testimony we permitted in *Echavarria v. State*, 108 Nev. 734, 839 P.2d 589 (1992).

[Headnote 8]

On appeal, Thomas objects to Dr. Panacek's general testimony about recall bias on the grounds that it amounted to an improper, thinly veiled comment on her credibility as a witness. Thomas's problem is that she did not timely raise or preserve this objection in the trial court. While Thomas mentioned recall bias in her omnibus motion in limine, she gave it just a single paragraph, stating ''Dr. Panacek is a medical doctor and an expert in Emergency Room medicine [and h]e is not qualified to testify regarding a subject called 'recall bias,' which is not even subject to expert application.'' Fairly read, this objection went to Dr. Panacek's qualifications to give recall bias testimony, not its helpfulness. Because the trial court properly declined to give a definitive ruling on this sketchy objection (which appears invalid in any event—Dr. Panacek's master's in Public Health qualified him on recall bias, *see supra* note 9), the contemporaneous objection rule required Thomas to object at trial. *See Richmond v. State*, 118 Nev. 924, 929-32, 59 P.3d 1249, 1252-54 (2002); NRS 47.040(1).

Thomas did not renew her motion in limine or ask the court to exclude all testimony about recall bias before Dr. Panacek testified, as our dissenting colleague would find. Before Dr. Panacek was called, Thomas reminded the court and opposing counsel that the section of her motion in limine concerning Dr. Panacek remained unresolved in several respects, recall bias being one. She did not renew her motion in limine or ask for an order forbidding reference to recall bias. Instead, Thomas affirmatively advised that she might well have no objections to Dr. Panacek being asked about re-

---

[10]Applying *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), *Nichols* also concludes such testimony is neither reliable nor relevant and therefore inadmissible as expert testimony. Although *Higgs v. State*, 126 Nev. 1, 17, 222 P.3d 648, 658 (2010), adopts a more deferential and flexible standard than *Nichols* did in applying *Daubert*, it appears doubtful that ''recall bias'' testimony qualifies as providing ''assistance'' under *Higgs*.

call bias, depending on what was asked and the foundation laid. Per Thomas, WMC's counsel ''is a very experienced and skillful lawyer [who] knows how to phrase a question . . . we're just going to have to wait and see whether the question occurs to any of us as being objectionable. It may not be.''

On appeal Thomas challenges the district court's admission of *any* testimony on the subject of recall bias. But as noted, this was not the objection in the omnibus motion in limine or in the colloquy that preceded Dr. Panacek's testimony. True to her stated position in the trial court, Thomas allowed Dr. Panacek to testify for five pages about recall bias, in general, and its application to epidemiology and bad medical outcomes, in particular, without objection. It was only when Dr. Panacek was asked if he had ''an opinion . . . to a reasonable medical probability that recall bias is involved'' in this case that Thomas objected.

When Thomas finally objected, the court called a recess. After the jury was excused, Thomas volunteered that she had made a deliberate, tactical decision not to object to the general recall bias testimony ''because it's general information that really isn't anything that we all don't know.'' Thomas stated that her objection was to Dr. Panacek tying recall bias to the facts in this case, which Thomas argued was more prejudicial than probative and a comment on Thomas's credibility, invading the province of the jury. The court sustained Thomas's objection to the question asked before the recess—whether Dr. Panacek had an opinion about recall bias being involved in the case. However, the court stated that it would overrule the objection to recall bias testimony in general. But this latter ruling was gratuitous because by then the general recall bias testimony had been admitted without objection and Thomas's counsel had stated that he didn't deem the general testimony harmful or even objectionable. Following the break, defense counsel spent only two pages on recall bias and covered nothing that hadn't already been covered without objection in greater detail before the break.

[Headnote 9]

NRS 47.040(1)(a) requires a party who objects to the admission of evidence to make ''a timely objection or motion to strike . . . , stating the specific ground of objection.'' The ''failure to specifically object on the grounds urged on appeal preclude[s] appellate consideration on the grounds not raised below.'' *Pantano v. State*, 122 Nev. 782, 795 n.28, 138 P.3d 477, 486 n.28 (2006). ''This rule is more than a formality,'' since an objection educates both the trial court and the opposing party, who is entitled to revise course according to the objections made. 1 Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, *Federal Rules of*

Evidence Manual § 103.02[9], at 103-18 (9th ed. 2006). Where, as here, an objection was stated as to certain evidence but not to other related evidence, and this was confirmed on the record to be the product of deliberate choice, ''[t]here is no reason . . . to allow reconsideration of this strategic choice on appeal.'' *Id.*

[Headnote 10]

We agree with the dissent that it can be argued that there isn't much difference between general questions about recall bias and the question that would have tied the concept to this case directly. *See Townsend v. State*, 103 Nev. 113, 118-19, 734 P.2d 705, 709 (1987). That argument is off limits to Thomas here, though, given her failure to timely object to the testimony about recall bias in general, her lawyer's affirmation that such a difference did exist and was the crux of the matter, and the frank, on-the-record acknowledgment that the effect of the general recall bias testimony was negligible. Certainly, on this record, the error in allowing the general testimony about recall bias cannot qualify as plain. *See Lioce v. Cohen*, 124 Nev. 1, 16, 174 P.3d 970, 980 (2008); NRS 47.040(2); *see also United States v. Yu-Leung*, 51 F.3d 1116, 1121-22 (2d Cir. 1995) (a decision not to raise an objection for strategic reasons amounts to waiver, not merely forfeiture, and is not reviewable even for plain error (discussing *United States v. Olano*, 507 U.S. 725 (1993))).[11]

E. *Dismissal of Brandi Thomas's claims*

[Headnote 11]

The district court dismissed the amended complaint naming Brandi Thomas as an additional party plaintiff based on the statute of limitations in NRS 41A.097(4). On appeal, Brandi Thomas seeks to challenge the dismissal on constitutional and ''relation

[11]Even crediting arguendo the dissent's finding of preserved error as to the general recall bias testimony, we cannot agree that the error ''so substantially affected [appellant's] rights that it could be reasonably assumed that if it were not for the alleged error[ ], a different result might reasonably have been expected,'' which is required to prevail on harmless error review. *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971). Reason to question Thomas's memory of the emergency room visit existed separate and apart from Dr. Panacek's recall bias testimony, in her testimony that aspirin wasn't administered when the record shows it was and her deposition testimony that she wasn't given papers to take home which she later located and produced. *See* 21 C. Wright & K. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5035.2, at 630-34 (2d ed. 2005) (that evidence is cumulative of other properly admitted evidence suggests the error may be harmless). Given Thomas's trial court admission that the general recall bias testimony was ''information that really isn't anything that we all don't know'' and the weight of the other evidence favoring the jury's finding of no negligence, we find the error, even if preserved, to have been harmless.

back'' grounds. The district court did not address either challenge, because they weren't raised until a motion for reconsideration was filed. Citing *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976), the district court denied reconsideration because this was not one of the ''rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached.'' Since the district court denied the motion for reconsideration for procedural reasons and not on its merits, *Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007), is not of help. And, while we have reached constitutional issues not addressed by the district court, *Barrett v. Baird*, 111 Nev. 1496, 1500, 908 P.2d 689, 693 (1995), *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008), it does not appear appropriate to do so in this case.

We therefore affirm.

PARRAGUIRRE, C.J., and HARDESTY, DOUGLAS, SAITTA, and GIBBONS, JJ., concur.

CHERRY, J., concurring in part and dissenting in part:

The majority rejects Thomas's argument that the district court materially prejudiced her case by allowing any testimony regarding so-called recall bias, concluding that Thomas did not object to the recall bias testimony proffered and that, at any rate, the district court's error in allowing the testimony was harmless. But in so concluding, the majority gives short shrift to the nature of recall bias evidence in the context of this case, where only Thomas's credibility was implicated by the recall bias testimony, and the record of Thomas's repeated objections to any such testimony. I would reverse the district court's judgment based on this issue, and thus, I dissent from that aspect of the majority's decision.

As the majority notes, recall bias is typically implicated in large-scale research studies. For instance, in a study of the effects of a certain pharmaceutical drug on a particular segment of the population, recall bias refers to the tendency of research subjects who experience a negative outcome such as cancer or a birth defect to ''recall,'' inaccurately, that they have been exposed at an earlier time to a suspected or known causal factor of the outcome. As one magazine article appended to a federal court of appeals opinion noted with regard to studies of the connection, if any, between a prenatal pharmaceutical and birth defects, ''[w]omen with normal babies may forget they took the drug and those with malformed babies may be more likely to remember—or vice versa. The bias is essentially unmeasureable.'' *McBride v. Merrell Dow and Pharmaceuticals Inc.*, 717 F.2d 1460, 1468 (D.C. Cir. 1983). The implication is that research subjects who experience a negative outcome may be unreliable with regard to whether they were ex-

posed to a suspected causal factor. While the notion of recall bias might be useful in assessing the validity of large-scale research studies, applying it to an individual impermissibly invades the jury's role of evaluating witness credibility.

When, as here, liability turns on a single witness's credibility, allowing recall bias testimony effectively constitutes permitting an expert to assess the individual witness's credibility, the result of which likely is a different verdict than reasonably might have been expected if the testimony had been precluded. *See El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971). Since Thomas offered the primary testimony as to causation in this case, Dr. Panacek's recall bias testimony, even though stated in general terms, amounted to testifying as to Thomas's credibility. That is, because only Thomas experienced a negative outcome—specifically, her husband's death—the recall bias theory discussed by Dr. Panacek necessarily must have been connected to Thomas's testimony as to this fundamental issue, suggesting that her testimony was not credible. The majority agrees that there is little difference between general questions about recall bias and the question that would have tied the concept directly to this case, *ante* at 14 (citing *Townsend v. State*, 103 Nev. 113, 118-19, 734 P.2d 705, 709 (1987)), but refuses to address the problem because the majority believes Thomas failed to raise a contemporaneous objection to Dr. Panacek's recall bias testimony.

But Thomas objected to such evidence at least four times before the district court decided to address the issue, and a fifth time during the same colloquy out of which the majority selects two statements to conclude that Thomas waived any objection. Thomas first objected to all recall bias testimony through a motion in limine to exclude any such testimony from being offered at trial. The majority dismisses the motion-in-limine objection as merely objecting to Dr. Panacek's qualifications to give recall bias testimony, not to recall bias testimony itself. But the majority ignores the import of Thomas's motion-in-limine argument that recall bias ''is not even subject to expert application''—an objection, not to Dr. Panacek's qualifications, but to the general subject of recall bias. Indeed, Thomas supported her statement with a citation to *Santillanes v. State*, 104 Nev. 699, 765 P.2d 1147 (1988), in which this court recognized that the admissibility of scientific evidence depends on its trustworthiness and reliability, indicating that Thomas questioned the substance of recall bias evidence. Undoubtedly, then, Thomas was objecting to the admission of any recall bias testimony based on lack of reliability and trustworthiness, not based on Dr. Panacek's qualifications to testify about it, as the majority contends.

The district court deferred ruling on that aspect of Thomas's motion in limine until the pretrial conference. At the pretrial con-

ference, Thomas again objected to the presentation of any recall bias testimony, but the district court deferred ruling on the objection until trial. At trial, just before Dr. Panacek was called to testify, Thomas objected a third time. On the district court's inquiry as to any outstanding motion-in-limine issues regarding Dr. Panacek, Thomas reminded the court that it had yet to rule regarding ''the recall bias testimony of Dr. Panacek'' and his correspondingly ''speculating on [Thomas's] state of mind'' at the time of the events at issue. The district court again deferred ruling on the issue, explaining that it needed to first hear the testimony. When Dr. Panacek began his testimony regarding recall bias, Thomas did not raise her fourth objection until respondents asked Dr. Panacek whether recall bias was a factor in this case. A colloquy outside of the jury's presence followed, during which the district court sustained Thomas's objection to Dr. Panacek tying recall bias to Thomas, but overruled her objection to Dr. Panacek's more general recall bias testimony.

In the face of Thomas's numerous objections to any recall bias testimony, the majority nonetheless affirms based on two statements that Thomas made. First, during Thomas's third objection, when Thomas objected during trial, just before Dr. Panacek testified, she stated that she would ''wait and see'' whether the questions posed to Dr. Panacek were objectionable. Second, during the colloquy after Thomas's fourth objection to any recall bias testimony, Thomas offered that she intentionally did not object at the time Dr. Panacek began to testify regarding recall bias testimony because she did not find general recall bias testimony objectionable. But the majority fails to mention that moments later, during that same colloquy, Thomas made a fifth objection to any recall bias testimony being offered, stating that because ''only plaintiffs have any recall in this case[, e]ven the general information is prejudicial [and] without probative value.''

And regardless of the two statements on which the majority relies, Thomas's third objection, raised before Dr. Panacek began testifying, certainly constitutes the contemporaneous objection necessary to preserve this issue for appeal. *See Richmond v. State*, 118 Nev. 924, 929-32, 59 P.3d 1249, 1252-54 (2002). After the district court deferred ruling on Thomas's objection as to the admissibility of recall bias testimony a third time, explaining that it needed to first hear the testimony, the district court was at least implicitly, if not explicitly, ruling that it would admit general testimony regarding recall bias. Given that the district court repeatedly refused to rule on Thomas's objections until finally deciding the issue during the colloquy, it is unclear what else Thomas could have done without alienating the jury. *See Bocher v. Glass*, 874 So. 2d 701,

704 (Fla. Dist. Ct. App. 2004) (recognizing that counsel risks alienating the jury with repeated objections). Even the district court was convinced that the objection had been preserved, as evidenced by the district court assuring Thomas that she had, in fact, preserved for appeal her objection to the recall bias testimony. Considered along with Thomas's first four objections, the record demonstrates that Thomas sufficiently preserved the issue despite the two inconsistent statements made during her third and fourth objections to recall bias testimony.

The majority fails to appreciate the substantial prejudicial effect of permitting even general recall bias testimony that directly implicated Thomas's right to have a jury resolve the issue of her credibility and correspondingly declines to discuss that issue based on an incomplete analysis of the extent to which Thomas attempted to preclude any recall bias testimony from the trial and preserve the issue for appeal; I therefore respectfully dissent from that portion of the majority's decision concluding that Thomas failed to preserve the admissibility issue for appeal and that, even if she had, allowing the recall bias testimony was merely harmless error. Had the district court properly precluded the presentation of this recall bias testimony, a different result reasonably might have been reached and the judgment should thus be reversed.

The district court abused its discretion by allowing any testimony whatsoever regarding recall bias. The correct and prudent action would have been to disallow any and all testimony concerning recall bias because such testimony, whether generally presented or specifically related to this case, in which only Thomas's credibility was at issue, invades the province of the jury and is definitely prejudicial. In light of the above, I respectfully dissent and would award Thomas a new trial free of any mention of recall bias.

STEVEN M. BETSINGER, APPELLANT/CROSS-RESPONDENT, *v*. D.R. HORTON, INC., A NEVADA CORPORATION; JEFF WARD; DEBRA MARTINEZ; DHI MORTGAGE COMPANY, LTD., A TEXAS LIMITED PARTNERSHIP FKA CH MORTGAGE COMPANY I, LTD., A NEVADA LIMITED PARTNERSHIP; AND DANIEL CALLAHAN, INDIVIDUALLY, RESPONDENTS/CROSS-APPELLANTS.

No. 50510

May 27, 2010 232 P.3d 433

Appeal and cross-appeal from a district court final judgment in an action based on fraud and deceptive trade practices. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Putative mortgagor filed suit against mortgagee and its branch manager, alleging fraud and deceptive trade practices involving the sale of a house. The district court entered judgment, on jury verdict, for mortgagor, and awarded him compensatory and punitive damages. Mortgagor appealed, and defendants cross-appealed. The supreme court, PARRAGUIRRE, C.J., held that: (1) mortgagor was only required to prove deceptive trade practices by preponderance of the evidence, (2) mortgagor was required to demonstrate that he suffered some physical manifestation of emotional distress in order to support award for emotional damages, and (3) punitive damages could not be awarded against mortgagee's branch manager.

Affirmed in part, reversed in part, and remanded with instructions.

Bailey Kennedy and *Dennis L. Kennedy* and *Sarah E. Harmon*, Las Vegas; *Feldman Graf, P.C.*, and *David J. Feldman* and *J. Rusty Graf*, Las Vegas, for Appellant/Cross-Respondent.

Lionel Sawyer & Collins and *David N. Frederick* and *Todd E. Kennedy*, Las Vegas; *Wood, Smith, Henning & Berman, LLP*, and *Joel D. Odou* and *Tod R. Dubow*, Las Vegas, for Respondents/Cross-Appellants.

1. EVIDENCE.
   Generally, a preponderance of the evidence is all that is needed to resolve a civil matter unless there is clear legislative intent to the contrary.
2. ANTITRUST AND TRADE REGULATION.
   Deceptive trade practices, as defined under the Deceptive Trade Practices Act, must only be proven by a preponderance of the evidence. NRS 598.0903 *et seq*.
3. DAMAGES.
   Putative mortgagor was required to demonstrate that he suffered some physical manifestation of emotional distress in order to support an award of emotional damages resulting from allegedly deceptive trade

practices by mortgage lender in connection with a failed real estate and lending transaction.

4. ANTITRUST AND TRADE REGULATION.
   Punitive damages could not be awarded by jury against mortgagee's branch manager unless it could find compensatory damages in putative mortgagor's suit alleging deceptive trade practices in connection with a failed real estate and lending transaction.
5. APPEAL AND ERROR.
   Remand of punitive damages award was warranted in deceptive trade practices action against mortgagee, where the supreme court could not be certain what jury would have awarded in punitive damages as result of substantially reduced compensatory award.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, C.J.:

In this opinion, we consider the proper burden of proof that should apply for a cause of action brought under NRS Chapter 598's deceptive trade practices statutory scheme. We conclude that any cause of action for deceptive trade practices under NRS Chapter 598 must be proven by a preponderance of the evidence. We further conclude that a substantial portion of Steven Betsinger's compensatory damage award must be reversed because he failed to present evidence of any physical manifestation of emotional distress. As a consequence of this decision, we reverse the punitive damages award against Daniel Callahan because Betsinger failed to recover any general damages against Callahan aside from damages for emotional distress. Additionally, we remand for a new trial on punitive damages against DHI Mortgage Company, Ltd., because we are unable to adequately review the jury's punitive damages award in light of our decision to substantially reduce the compensatory damages award.

FACTS AND PROCEDURAL HISTORY

This appeal and cross-appeal arise out of a lawsuit filed by appellant/cross-respondent Steven Betsinger against respondents/cross-appellants (respondents) D.R. Horton, Inc. (DRH), DHI Mortgage Company, Ltd., Daniel Callahan, Jeff Ward, and Debra Martinez for fraud and deceptive trade practices involving the sale of a house built by DRH with financing from DHI Mortgage.

In this case, Betsinger contracted to buy a DRH-built house in Las Vegas. He sought a mortgage loan from DRH's financing division, DHI Mortgage, and made a $4,900 earnest-money deposit to secure the purchase.

After making final preparations to relocate his family to Las Vegas, Betsinger was informed by Callahan, a DHI Mortgage branch manager, that DHI Mortgage could not offer him the low mortgage interest rate that had been originally suggested. Instead of the originally suggested ''primary residence'' rate of 4.625%, Callahan told Betsinger that DHI Mortgage could only offer him a rate of 6.5% under the premise that the Las Vegas house could not qualify as Betsinger's ''primary residence'' because he did not intend to seek full-time employment in the Las Vegas area.

Unwilling to accept the higher rate of interest, Betsinger canceled the purchase contract. Before doing so, Betsinger inquired as to whether his deposit would be refunded. Although the unsigned purchase contract provided that the deposit was nonrefundable, Betsinger testified that Callahan, Ward (the Director of Sales and Marketing for DRH), and Martinez (a DRH salesperson) all informed him that his $4,900 deposit would be returned. DRH never refunded Betsinger's deposit.

Betsinger subsequently commenced this action, alleging that (1) DRH, Ward, and Martinez had engaged in fraud by telling him that his earnest-money deposit would be returned after he canceled his purchase contract; (2) Callahan had engaged in fraud by ''baiting'' him with a 4.625% mortgage rate so that he would place a $4,900 earnest-money deposit, then ''switching'' the rate to 6.5%; and (3) all defendants had engaged in deceptive trade practices.

After a five-day trial, the jury returned a special verdict finding that DHI Mortgage and Callahan had engaged in fraud, that all the defendants had engaged in deceptive trade practices, and that punitive damages should be awarded against DHI Mortgage and Callahan. The jury awarded Betsinger $53,727 in compensatory damages: actual damages in the amount of $10,727 ($5,190 from DRH and $5,537 from DHI Mortgage); and consequential damages for emotional distress, mental anguish, embarrassment, and loss of peace of mind in the amount of $43,000 ($11,000 from DRH, $22,000 from DHI Mortgage, and $10,000 from Callahan).[1] The jury also awarded Betsinger $1,542,500 in punitive damages ($1,500,000 from DHI Mortgage and $42,500 from Callahan), which was later reduced to $300,000 pursuant to NRS 42.005's statutory cap. This appeal and cross-appeal followed.[2]

---

[1]The jury awarded $48,000 in emotional distress damages, but $5,000 of that amount was against an individual who settled and is not a party to this appeal.

[2]Having concluded that the punitive damages award against DHI Mortgage must be remanded to the district court for additional proceedings, we decline to address Betsinger's only issue on appeal challenging the constitutionality of NRS 42.005's statutory cap on punitive damages in this instance. We also reject respondents' other challenges to the district court's judgment on cross-appeal that are not specifically addressed in this opinion.

DISCUSSION

A cause of action for deceptive trade practices must be proven by a preponderance of the evidence

Respondents allege on cross-appeal that the district court failed to appropriately instruct the jury as to the correct burden of proof for a deceptive trade practices claim against them. They allege that the district court imprecisely instructed the jury that some deceptive trade practices must only be proven by a preponderance of the evidence while others require proof by clear and convincing evidence, and that the district court did not specify which burden of proof was required for which particular deceptive trade practice. While we agree that the district court improperly instructed the jury on both burdens of proof, reversal on this ground is unnecessary because deceptive trade practices must only be proven by a preponderance of the evidence, which is a lesser evidentiary standard than clear and convincing evidence.

[Headnote 1]

Generally, a preponderance of the evidence is all that is needed to resolve a civil matter unless there is clear legislative intent to the contrary. *See Mack v. Ashlock*, 112 Nev. 1062, 1066, 921 P.2d 1258, 1261 (1996) (''[A]bsent a clear legislative intent to the contrary . . . the standard of proof in [a] civil matter must be a preponderance of the evidence.'').

[Headnote 2]

NRS Chapter 598 is silent as to the plaintiff's burden of proof for deceptive trade practices. *See* NRS 598.0903-.0999. Thus, while some deceptive trade practices defined in NRS Chapter 598 sound in fraud, *see, e.g.*, NRS 598.0923(2), which, under common law, must be proven by clear and convincing evidence, *see Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 110-11, 825 P.2d 588, 592 (1992), we cannot conclude that deceptive trade practices claims are subject to a higher burden of proof absent a legislative directive. *See Mack*, 112 Nev. at 1066, 921 P.2d at 1261.

This accords with the approach taken by many other jurisdictions that have enacted similar consumer protection statutes. *See Hanson-Suminski v. Rohrman Motors*, 898 N.E.2d 194, 203 (Ill. App. Ct. 2008) (''[T]he appropriate standard of proof for a statutory fraud claim [under the Illinois Consumer Fraud Act] is preponderance of the evidence.''); *Dunlap v. Jimmy GMC of Tucson, Inc.*, 666 P.2d 83, 88-89 (Ariz. Ct. App. 1983); *State Ex. Rel. Spaeth v. Eddy Furniture Co.*, 386 N.W.2d 901, 903 (N.D. 1986).[3]

---

[3]Similar consumer fraud legislation carries a variety of titles, such as ''unfair trade practices,'' ''consumer fraud,'' and ''deceptive trade practices.'' *See Dunlap*, 666 P.2d at 89 n.1.

In *Dunlap*, the Arizona Court of Appeals recognized that a plaintiff has the burden of proving common law fraud by clear and convincing evidence. 666 P.2d at 88. However, because statutory fraud is separate and distinct from common law fraud, the Court stated that ''[t]he mere fact that the word 'fraud' appears in the title of [Arizona's] consumer protection statute does not give rise to an inference that the legislature intended to require a higher degree of proof than that ordinarily required in civil cases.'' *Id.* at 89. The court further concluded that the purpose of the consumer protection statute was to provide consumers with a cause of action that was easier to establish than common law fraud, and therefore, statutory fraud must only be proven by a preponderance of the evidence. *See id.*

We agree with the Arizona Court of Appeals' reasoning in *Dunlap*. Statutory offenses that sound in fraud are separate and distinct from common law fraud. Therefore, we conclude that deceptive trade practices, as defined under NRS Chapter 598, must only be proven by a preponderance of the evidence.

Having concluded as such, we do not need to disturb the jury's verdict because the jury found all defendants liable for deceptive trade practices even though the district court improperly instructed the jury that some deceptive trade practices must be proven by the higher standard of clear and convincing evidence. Accordingly, we affirm the district court's judgment in this respect.[4]

Compensatory damages award—damages for emotional distress

Respondents next contend on cross-appeal that the jury's compensatory award relating to emotional distress damages must be reversed because Betsinger failed to demonstrate any physical manifestation of emotional distress. We agree, and therefore reverse the jury's $43,000 emotional distress damages award.

[Headnote 3]

We have previously required a plaintiff to demonstrate that he or she has suffered some physical manifestation of emotional distress in order to support an award of emotional damages. *See, e.g.*, *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 448, 956 P.2d 1382, 1387 (1998) (''[I]n cases where emotional distress damages are not secondary to physical injuries, but rather, precipitate physical symptoms, either a physical impact must have occurred or, in the absence of physical impact, proof of 'serious emotional distress'

---

[4]Respondents tangentially argue that NRS Chapter 598's statutory scheme does not regulate the deceptive sale of real property; therefore, DRH could not be held liable for a deceptive trade practice. Having reviewed this issue, we reject respondents' narrow interpretation of NRS Chapter 598 and conclude that this argument is without merit.

causing physical injury or illness must be presented.''); *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 482-83, 851 P.2d 459, 462 (1993). While we have relaxed the physical manifestation requirement in a few limited instances, *see Olivero v. Lowe*, 116 Nev. 395, 400, 995 P.2d 1023, 1026 (2000) (explaining that the physical manifestation requirement is more relaxed for damages claims involving assault), we cannot conclude that a claim for emotional distress damages resulting from deceptive trade practices in connection with a failed real estate and lending transaction should be exempted from the physical manifestation requirement.

Unlike in *Olivero*, where we stated that ''the nature of a claim of assault is such that the safeguards against illusory recoveries mentioned in *Barmettler* and *Chowdhry* are not necessary,'' 116 Nev. at 400, 995 P.2d at 1026, there is no guarantee of the legitimacy of a claim for emotional distress damages resulting from a failed real estate and lending transaction without a requirement of some physical manifestation of emotional distress.

Thus, because Betsinger failed to present any evidence that he suffered any physical manifestation of emotional distress, we reverse the jury's award of $43,000 in emotional distress damages. Accordingly, Betsinger's compensatory damages award should be reduced to $10,727, the amount of Betsinger's actual damages, as determined by the jury.

The punitive damages must be reversed and remanded

In light of our decision to reduce Betsinger's compensatory damages award by more than 80%, we must now consider the appropriateness of his punitive damages award against Callahan and DHI Mortgage.

[Headnote 4]

As against Callahan, the punitive damages award must be stricken in its entirety because Betsinger did not recover any compensatory damages from Callahan other than those relating to emotional distress. *See Bongiovi v. Sullivan*, 122 Nev. 556, 582-83, 138 P.3d 433, 451-52 (2006); *City of Reno v. Silver State Flying Serv.*, 84 Nev. 170, 180, 438 P.2d 257, 264 (1968) (''Punitive damages cannot be awarded by a jury unless it first finds compensatory damages.'').

[Headnote 5]

As against DHI Mortgage, the punitive damages award must be remanded for further proceedings because we cannot be sure what the jury would have awarded in punitive damages as a result of the substantially reduced compensatory award. Because of our uncertainty, we are unable to meaningfully review the excessiveness of the current punitive damages award, and we refuse to arbitrarily re-

duce the amount. *See Bongiovi*, 122 Nev. at 582-83, 138 P.3d at 452 (explaining that we review whether punitive damages are excessive de novo to ‘‘ ‘ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered’ ’’ (quoting *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003))).

Accordingly, we affirm the district court court's judgment in part, reverse in part, and remand this matter to the district court for proceedings consistent with this opinion.

HARDESTY, DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

CHARLES MARVIN; GARY TAYLOR; AND 400 TUSCARORA ROAD, LLC, FOR THEMSELVES AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED TAXPAYERS, APPELLANTS, *v.* CLAY FITCH; STEPHEN R. JOHNSON; RICHARD MASON; AND MICHAEL CHESHIRE, INDIVIDUAL MEMBERS OF THE STATE BOARD OF EQUALIZATION, RESPONDENTS.

No. 52447

May 27, 2010 232 P.3d 425

Appeal from a district court order of dismissal, certified as final under NRCP 54(b), in a 42 U.S.C. § 1983 action. First Judicial District Court, Carson City; James Todd Russell, Judge.

Taxpayers filed § 1983 claim against individual members of the State Board of Equalization, alleging that their civil rights had been violated by the board's failure to perform its statutory duty to equalize property valuations. The district court dismissed, finding the board members absolutely immune from suit. Taxpayers appealed. The supreme court, HARDESTY, J., held that: (1) board members' decision to not equalize the taxpayers' property valuations constituted a decision regarding the equalization process; and (2) board was performing a quasi-judicial function when it determined whether to equalize property valuations, and its members therefore had absolute immunity.

Affirmed.

Morris Peterson and *Suellen Fulstone*, Reno, for Appellants.

Catherine Cortez Masto, Attorney General, *Keith D. Marcher*, Senior Deputy Attorney General, and *Dennis L. Belcourt*, Deputy Attorney General, Carson City, for Respondents.

1. JUDGES; OFFICERS AND PUBLIC EMPLOYEES.
   Absolute immunity is a broad immunity that is granted sparingly to individuals performing judicial or quasi-judicial functions.
2. APPEAL AND ERROR.
   On review of district court's decision dismissing taxpayers' § 1983 suit against individual members of the State Board of Equalization, the supreme court did not consider supplemental material from either party, where materials were not presented to or considered by the district court. 42 U.S.C. § 1983.
3. APPEAL AND ERROR.
   Supreme court, in reviewing order of dismissal for failure to state a claim upon which relief can be granted, will accept the factual allegations of the pleading as true while construing those facts in favor of the nonmoving party. NRCP 12(b)(5).
4. CIVIL RIGHTS.
   Whether absolute immunity is an appropriate defense in taxpayers' § 1983 suit against members of the State Board of Equalization is a question of law. 42 U.S.C. § 1983.
5. TAXATION.
   State Board of Equalization's decision to not equalize the taxpayers' property valuations constituted a decision regarding the equalization process. NRS 361.360(1).
6. OFFICERS AND PUBLIC EMPLOYEES.
   Immunity is a matter of public policy that balances the social utility of the immunity against the social loss of being unable to attack the immune defendant.
7. JUDGES.
   Absolute immunity protects judicial officers from collateral attack and recognizes that appellate procedures are the appropriate method of correcting judicial error.
8. OFFICERS AND PUBLIC EMPLOYEES.
   Generally, qualified immunity, rather than absolute immunity, is sufficient to protect nonjudicial officers in the performance of their duties.
9. OFFICERS AND PUBLIC EMPLOYEES.
   Qualified immunity and absolute immunity are distinguishable: absolute immunity defeats a suit at the outset of litigation as long as the official's actions were within the scope of the immunity, whereas qualified immunity may also provide immunity from suit so long as the defendant's actions were not in violation of clearly established law.
10. JUDGES; OFFICERS AND PUBLIC EMPLOYEES.
    The ''functional approach'' utilized to determine whether an individual is entitled to absolute immunity takes into consideration various factors including: whether the individual is performing many of the same functions as a judicial officer, whether there are procedural safeguards in place similar to a traditional court, whether the process or proceeding is adversarial, the ability to correct errors on appeal, and whether there are any protective measures to ensure the constitutionality of the individual's conduct and to guard against political influences.
11. STATUTES.
    When the Legislature has addressed a particular matter with imperfect clarity, the supreme court will consider the statutory scheme as a whole and any underlying policy in order to interpret the law.
12. CIVIL RIGHTS.
    Application of ''functional approach'' test supported finding that the State Board of Equalization is performing a quasi-judicial function when

determining whether to equalize property valuations, and its members therefore have absolute immunity in § 1983 suit; equalization process requires state board members to perform functions similar to judicial officers, such as fact-finding and making decisions regarding necessity and method of equalization, the process is adversarial in addressing challenges to property valuation, board's notice requirements are procedural safeguards similar to a court, its errors can be corrected on appeal, and statutory scheme shields collective membership from political influence. 42 U.S.C. § 1983; NRS 361.395.

13. JUDGES.

Judicial officers exercise independent judgment to issue subpoenas, rule on proffers of evidence, regulate the course of hearings, and make or recommend decisions.

14. CONSTITUTIONAL LAW.

Notice is a fundamental requisite of due process that is employed as a procedural safeguard in any judicial action. U.S. CONST. amend. 14.

15. CIVIL RIGHTS.

Public policy considerations supported finding that the State Board of Equalization is performing a quasi-judicial function when determining whether to equalize property valuations, and its members therefore have absolute immunity in § 1983 suit; if the equalization process was administrative, rather than quasi-judicial, taxpayers in general would not be assured of their adversarial right to participate in the meetings, present evidence, provide testimony, or seek judicial review. 42 U.S.C. § 1983; NRS 361.395.

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

[Headnote 1]

In this appeal, we consider the application of absolute immunity to individual members of the State Board of Equalization (State Board). Absolute immunity is a broad immunity that is granted sparingly to individuals performing judicial or quasi-judicial functions. *State of Nevada v. Dist. Ct. (Ducharm)*, 118 Nev. 609, 615-16, 55 P.3d 420, 423-24 (2002). On appeal, appellants Charles Marvin, Gary Taylor, and 400 Tuscarora Road, LLC (collectively, the Taxpayers), argue that the members of the State Board do not qualify for absolute immunity because the State Board refused to perform its duty of equalizing property valuations throughout the state pursuant to NRS 361.395.[2] We disagree and conclude that the

[1]THE HONORABLE KRISTINA PICKERING, Justice, did not participate in the decision of this matter.

[2]This appeal is limited to the liability of the individual members of the State Board pursuant to the district court's certification of the judgment pertaining to the individual members under NRCP 54(b).

State Board is performing a quasi-judicial function when determining whether to equalize property valuations, and its members therefore have absolute immunity.

FACTS

The Taxpayers own residential property located in the Incline Village and Crystal Bay areas of Washoe County, Nevada. In 2007, the Washoe County Board of Equalization (County Board) determined that the county assessor had utilized improper and unconstitutional methods of appraising real property and, consequently, the County Board reduced the value of various properties in Washoe County. Allegedly, the County Board did not adjust or equalize the assessed value of the Taxpayers' properties.

[Headnote 2]

In March 2007, the Taxpayers petitioned the State Board for relief from the County Board's failure to equalize the assessed value of their properties. The State Board conducted a hearing on the matter and determined that it lacked jurisdiction because the Taxpayers had failed to first petition the County Board, as required by NRS 361.360.[3] The Taxpayers subsequently filed a petition for judicial review of the State Board's decision and, within the same pleading, asserted a separate claim under 42 U.S.C. § 1983, alleging that their civil rights had been violated by the State Board's failure to perform its statutory duty to equalize property valuations pursuant to NRS 361.395. The § 1983 claim was also brought against Clay Fitch, Stephen Johnson, Richard Mason, and Michael Cheshire, individual members of the State Board.

The district court granted the petition for judicial review and (1) remanded the matter to the State Board and/or the County Board to determine whether the Taxpayers had complied with the provisions of NRS 361.420, (2) remanded the matter to the State Board to establish a record as to whether the Department of Taxation had complied with the requirement to ensure equalization throughout the state, and (3) ordered the State Board to comply with its duty to equalize property valuations throughout the state.

The individual members of the State Board moved to dismiss the § 1983 claim against them under NRCP 12(b)(5), arguing that they are entitled to absolute immunity. The district court granted the motion and dismissed the § 1983 claim against the individual members reasoning that ''expos[ing] individual State Board [m]embers to civil rights claims based on their decision to raise values,

---

[3]On appeal, the members of the State Board made a motion to supplement the appellate record with a transcript of the hearing before the State Board wherein the State Board determined that it lacked jurisdiction. The Taxpayers filed an opposition to the State Board member's motion, as well as their own

lower values, or take no action when determining the equalization of values is inappropriate.''[4] The Taxpayers appeal this decision.

DISCUSSION

For clarity, we recognize that although the Taxpayers filed both a petition for judicial review and a § 1983 civil rights claim in the court below, this appeal is confined to the application of absolute immunity to the Taxpayers' § 1983 civil rights claim alleging that individual State Board members are liable because they refused to equalize property valuations pursuant to NRS 361.395. The Taxpayers contend that their § 1983 claim rests on the State Board's refusal to undertake its statutory duty to equalize property valuations under NRS 361.395. However, the record before the district court and this court shows that the State Board refused to equalize property valuations because the Taxpayers failed to adhere to the administrative procedures for review. Although the State Board's decision to not equalize the Taxpayers' property valuations based on administrative procedures may have been erroneous according to the district court, the State Board engaged in an equalization decision-making process and did not simply fail to equalize as the Taxpayers contend. In resolving this appeal, we must first examine when absolute immunity is applicable and then analyze whether the State Board's process of equalizing property valuations is a quasi-judicial function subject to such immunity. Finally, we address the policy considerations supporting our conclusion that the equalization process is quasi-judicial and the State Board members are afforded absolute immunity.

Standard of review

[Headnotes 3, 4]

This court rigorously reviews a district court order granting a motion to dismiss pursuant to NRCP 12(b)(5). *Sanchez v. Wal-Mart Stores*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009). And

---

motion that this court take judicial notice that the matter of statewide equalization did not appear on any State Board agenda for the relevant term. We denied the requested relief and do not consider the supplemental material from either party because neither the transcript nor the subject of the request for judicial notice were presented to or considered by the district court.

[4]We recognize that the district court may have commingled the petition for judicial review and the § 1983 civil rights claim when it reasoned that the State Board's determination that it did not have jurisdiction over the Taxpayers' petition was a quasi-judicial function. Regardless, we affirm the district court's outcome that absolute immunity is applicable. *See Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (noting that this court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason).

we will accept the factual allegations of the pleading as true while construing those facts in favor of the nonmoving party. *Id.* Whether absolute immunity is an appropriate defense for the members of the State Board is a question of law. *Duff v. Lewis*, 114 Nev. 564, 568, 958 P.2d 82, 85 (1998). We review questions of law de novo. *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 629, 218 P.3d 847, 850 (2009).

Judicial record

The record before the district court and this court indicates that the Taxpayers brought an appeal before the State Board complaining that the County Board failed to perform its duty of equalizing property valuations. However, the State Board declined to undertake any equalization process because the Taxpayers had neglected to file a petition for review with the County Board and, therefore, failed to adhere to the administrative procedures for equalization relief. As such, the State Board determined that it lacked jurisdiction to hear the Taxpayers' appeal or to proceed with the equalization process. While the Taxpayers claim the § 1983 action is based upon the State Board's refusal to equalize, nothing in the record supports that conclusion. *See Carson Ready Mix v. First Nat'l Bk.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (concluding that appellant bears the burden to make an adequate appellate record and noting that this court may not consider matters outside of the district court record on appeal); *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (stating that ''appellants are responsible for making an adequate appellate record'' and ''[w]hen an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision'').

[Headnote 5]

In its written decision, the State Board stated that it ''found no record that the Taxpayer[s] requested the County Board for equalization relief or that the County Board took action to grant or deny equalization relief to the subject property as required by NRS 361.360(1).'' Accordingly, the State Board concluded that, ''[b]ased on the lack of a record made to or by the County Board with regard to request for relief, or that the County Board took action to grant or deny relief, the State Board did not accept jurisdiction to determine this matter.'' Even though the district court found that the State Board's decision to not equalize the Taxpayers' property valuations was incorrect, it was nevertheless a decision regarding the equalization process. Therefore, we must determine whether that decision and the equalization process in general are afforded absolute immunity.

Absolute immunity

[Headnotes 6, 7]

On appeal, the Taxpayers challenge whether the individual members of the State Board are entitled to absolute immunity. Immunity ''is a matter of public policy that balances the social utility of the immunity against the social loss of being unable to attack the immune defendant.'' *Ducharm*, 118 Nev. at 614-15, 55 P.3d at 423 (quoting James L. Knoll, *Protecting Participants in the Mediation Process: The Role of Privilege and Immunity*, 34 Tort & Ins. L.J. 115, 122 (1998)). Absolute immunity protects judicial officers from collateral attack and recognizes that appellate procedures are the appropriate method of correcting judicial error. *Id*. at 615, 55 P.3d at 424.

[Headnotes 8, 9]

Generally, qualified immunity,[5] rather than absolute immunity, is sufficient to protect nonjudicial officers in the performance of their duties, *id*. at 617, 55 P.3d at 425 (quoting *Burns v. Reed*, 500 U.S. 478, 486-87 (1991)); however, in *Butz v. Economou*, the United States Supreme Court extended the application of absolute immunity to include various nonjudicial officers who participate in the judicial process. 438 U.S. 478, 513 (1978) (determining that the role of an administrative hearing examiner is ''functionally comparable' to that of a judge''). Following *Butz*, courts have applied absolute immunity to individuals who perform quasi-judicial functions. *Mishler v. Clift*, 191 F.3d 998, 1007 (9th Cir. 1999) (concluding that individual members of the Nevada Board of Medical Examiners are entitled to absolute immunity for their quasi-judicial acts); *Ducharm*, 118 Nev. at 617, 55 P.3d at 425; *Duff*, 114 Nev. at 571, 958 P.2d at 87 (holding that a court-appointed psychologist was entitled to absolute immunity because he was acting as an extension of the court).

[Headnote 10]

To determine whether an individual is entitled to absolute immunity, the Supreme Court has adopted a ''functional approach,'' which ''looks to the nature of the function performed, not the identity of the [individual] who performed it.'' *Romano v. Bible*, 169 F.3d, 1182, 1186 (9th Cir. 1999) (quoting *Buckley v. Fitzsim-*

---

[5]Qualified immunity and absolute immunity are distinguishable. *Ducharm*, 118 Nev. at 615 n.9, 55 P.3d at 423 n.9. ''[A]bsolute immunity defeats a suit at the outset of litigation as long as the official's actions were within the scope of the immunity.'' *Id*. Qualified immunity may also provide immunity from suit so long as the defendant's actions were not in violation of clearly established law. *See Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985).

mons, 509 U.S. 259, 269 (1993) (internal quotation omitted)). The ''functional approach'' takes into consideration various factors including: whether the individual is performing many of the same functions as a judicial officer, whether there are procedural safeguards in place similar to a traditional court, whether the process or proceeding is adversarial, the ability to correct errors on appeal, and whether there are any protective measures to ensure the constitutionality of the individual's conduct and to guard against political influences. *Id.* at 1186-87; *see also Ducharm*, 118 Nev. at 616, 55 P.3d at 424-25.

Applying the ''functional approach'' to this case, and following our further analysis below, we determine that the State Board and its individual members perform a quasi-judicial function when deciding to equalize property valuations. Accordingly, we conclude that the individual members are entitled to absolute immunity in their performance of this quasi-judicial act.

The State Board's duty to equalize property valuations is a quasi-judicial function

The Nevada Constitution mandates that ''[t]he [L]egislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory.'' Nev. Const. art. 10, § 1(1). The State Board is governed by NRS Chapter 361, which obligates the State Board to equalize property valuations throughout the state:

> [T]he [State Board] shall:
> (a) Equalize property valuations in the State.
> (b) Review the tax rolls of the various counties as corrected by the county boards of equalization thereof and raise or lower, equalizing and establishing the taxable value of the property.

NRS 361.395(1).We previously determined that, under the statutes, the State Board has two separate functions: ''equalizing property valuations throughout the state and hearing appeals from the county boards.'' *State, Bd. of Equalization v. Barta*, 124 Nev. 612, 628, 188 P.3d 1092, 1102 (2008). The State Board's predominant concern, however, should be the guarantee of a uniform and equal rate of taxation. *Id.*

[Headnote 11]

Although the statutes clearly provide that the State Board has a duty to equalize property valuations throughout the state, there appears to be a lack of certainty in the procedures for the equaliza-

tion process that has resulted in an ambiguity as to whether the process is an administrative or a quasi-judicial function. NRS 361.395(1) obligates the State Board to equalize property valuations, and NRS 361.395(2) and 361.405(1) require notice be given to property owners when equalization results in a proposed or actual increase to a property's valuation. However, NRS Chapter 361 lacks clarity as to the processes and procedures that the State Board undertakes in determining to equalize property valuations, equalization methods, and the relevant sequence of events. When the Legislature has addressed a particular matter with imperfect clarity, this court will consider the statutory scheme as a whole and any underlying policy in order to interpret the law. *See In re Orpheus Trust*, 124 Nev. 170, 174-75, 179 P.3d 562, 565 (2008).

[Headnote 12]

The Taxpayers argue that the duty to equalize property valuations is an administrative function that does not incorporate the traditional attributes of a judicial proceeding and, therefore, absolute immunity should not apply. We disagree and conclude that the State Board's equalization process is a quasi-judicial function. Considering the factors in the ''functional approach,'' the members of the State Board perform quasi-judicial functions because the equalization process requires the members to perform functions (fact-finding and making legal conclusions) similar to judicial officers, the process is adversarial, it applies procedural safeguards similar to a court, errors can be corrected on appeal, and the statutory scheme retains State Board members' independence from political influences.

State Board members perform functions similar to judicial officers

[Headnote 13]

Judicial officers exercise independent judgment to ''issue subpoenas, rule on proffers of evidence, regulate the course of . . . hearing[s], and make or recommend decisions.'' *Butz*, 438 U.S. at 513. The State Board is presented with evidence of property valuations from the county tax rolls or from interested property owners, and is required to make findings and issue decisions regarding the necessity and method of equalization. *See* NRS 361.395(1); NRS 361.385(1). Evaluating the necessity of equalization, State Board members have the ability to issue subpoenas and require witness testimony, NAC 361.712, as well as the authority to regulate the course of hearings and ''hold such number of [hearings] as may be necessary to care for the business of equalization presented to it.'' NRS 361.380(1). Because State

Board members receive evidence, render decisions, and regulate hearings, we conclude that members of the State Board function like judicial officers.

The equalization process is adversarial

Proceedings that are quasi-judicial ''are usually adversarial in nature and provide many of the same features and safeguards that are provided in court.'' *Romano*, 169 F.3d at 1186. The State Board's annual meetings are open to the public and permit individuals to participate in person or be represented by an attorney. NRS 361.385(1). At the meetings, an individual may challenge a property's valuation recorded on the county tax rolls and submit evidence for the State Board's consideration ''with respect to the valuation of his or her property or the property of others.'' *Id.*; *see* NRS 361.355. We conclude that the ability to contest the assessed value of one's own property or present evidence questioning the value of the property of others is a quintessential indication of the adversarial nature of the equalization process. Thus, we deem the State Board's equalization process to be adversarial in nature and ''functionally comparable'' to an adjudicatory proceeding. *See Butz*, 438 U.S. at 513.

Procedural safeguards applied to the equalization process

[Headnote 14]

Notice is a fundamental requisite of due process that is employed as a procedural safeguard in any judicial action. *See Browning v. Dixon*, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998). Nevada's statutory scheme regulating the equalization process safeguards a person's due process rights by requiring that public notice be given for the State Board's annual meeting, at which the State Board considers increases to property valuations. NRS 361.380(2). The public notice requirement is accomplished through ''publication in the statutes of the . . . time, place and purpose of [the annual meeting],'' *see id.*, by posting notices at the Department of Taxation offices in Carson City, Reno, Las Vegas, and Elko, *see* NAC 361.686(1); and in accordance with statutory public meeting notice requirements, *see* NRS 241.020. In the event that the State Board proposes to increase the valuation of any property, the State Board is required to give specific notice to the interested property owner detailing when and where the property owner may appear and submit evidence of the property's value. NRS 361.395(2). If the State Board does increase the property's valuation, the property owner is entitled to another notice of the increased value. NRS 361.405(1). We conclude that NRS Chapter 361's notice require-

ments are sufficient procedural safeguards to ensure that the public is afforded due process throughout the State Board's equalization process.

Ability to correct errors on appeal

Additionally, the ''correctability of error on appeal'' is another procedural ''safeguard[ ] built into the judicial process [that] tend[s] to reduce the need for private damages actions.'' *Butz*, 438 U.S. at 512. Recognizing that the State Board's equalization process is adversarial, the Legislature provided that a taxpayer may seek judicial review of a State Board's determination or bring a lawsuit ''in any court of competent jurisdiction in the State.'' NRS 361.420(2). ''No taxpayer may be deprived of any remedy or redress in a court of law'' for wrongs or deprivations resulting from the findings of the State Board. NRS 361.410(1). In such a case, a taxpayer may bring a lawsuit claiming that the property value assessment is ''discriminatory in that it is not in accordance with a uniform and equal rate of assessment and taxation, but is at a higher rate of the taxable value of the property so assessed than that at which the other property in the State is assessed.'' NRS 361.420(4)(g). We determine that a taxpayers' ability to appeal the State Board's decisions and findings provides the appropriate remedy to correct errors and is indicative of a quasi-judicial proceeding.

Protective measures to guard against political influences

Furthermore, a judge or quasi-judicial adjudicator should not allow political influences to affect his or her judicial conduct or judgment. NCJC Canon 2, Rule 2.4. The Legislature has attempted to protect the State Board members from the influence of political forces by creating strict membership qualifications. The State Board members are appointed by the governor and serve four-year terms. NRS 361.375(1) and (5). The State Board's membership must consist of one certified public accountant, one property appraiser, one member ''versed in the valuation of centrally assessed properties,'' and two members ''versed in business generally.'' NRS 361.375(2). Membership is further limited to no more than three members affiliated with the same political party, and no more than two members residing in the same county. NRS 361.375(3). No elected official or employee of an elected official may be appointed to serve, and no member can serve more than two full consecutive terms. NRS 361.375(4)-(5). We determine that the structure of the State Board's membership adequately shields its collective membership from political influence and allows them to function as neutral adjudicators.

Based on the foregoing, we conclude that the State Board performs a quasi-judicial function when deciding to equalize property valuations and, as such, its individual members are afforded absolute immunity from lawsuits based on their performance of this quasi-judicial act. *See Steinhart v. County of Los Angeles*, 223 P.3d 57, 63 (Cal. 2010) (recognizing that the board of equalization exercises quasi-judicial powers); *County of Adams v. Bd. of Equal.*, 566 N.W.2d 392, 397 (Neb. 1997) (stating that the actions of equaliz-ing property values between counties is quasi-judicial in nature); *Fayetteville Independent Sch. Dist. v. Crowley*, 528 S.W.2d 344 347 (Tex. Civ. App. 1975) (affirming that ''a board of equalization is a quasi-judicial body, charged with . . . equalization . . . of assessments'').

Policy considerations

[Headnote 15]

In addition to the application of the ''functional approach,'' our conclusion that the State Board members are entitled to absolute immunity is also supported by policy considerations, specifically, it facilitates the process and abides by legislative intent. ''The discretion which . . . officials exercise with respect to the initiation of . . . proceedings might be distorted if their immunity from damages arising from that decision was less than complete.'' *Butz*, 438 U.S. at 515. The State Board members should be permitted to ''make the decisions to move forward with a[ ] . . . proceeding free from intimidation or harassment.'' *Id.* at 516. The prospect of individual State Board members being subjected to litigation from every disgruntled property owner is likely to result in having State Board members who are reluctant or unable to perform their duties and will hinder the state's ability to recruit and retain qualified members.

Additionally, NRS Chapter 361 clearly demonstrates the Legislature's intent that the equalization process be open to the public and that the individual taxpayer be given notice of and the opportunity to participate in the State Board's valuation of his or her property. To conclude that the State Board's equalization process is a purely administrative function rather than a quasi-judicial function may preclude a taxpayers' ability to participate in this process.[6] If the equalization process was determined to be administrative, Nevada's taxpayers in general would not be assured of their adversarial right to participate in the meetings, present evidence, provide testimony, or seek judicial review. By concluding

[6]We do not address in this opinion whether Nevada's Administrative Procedure Act, codified in NRS Chapter 233B, permits judicial review of purely administrative functions.

that the State Board's equalization process is quasi-judicial, we honor the Legislature's intent and safeguard every taxpayers' right to meaningfully participate in the annual equalization process.

Accordingly, we affirm the district court's order dismissing the Taxpayers' § 1983 civil rights claim.

PARRAGUIRRE, C.J., and DOUGLAS, CHERRY, SAITTA, and GIBBONS, JJ., concur.

LEVENRAL DEMARLO POLK, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 52733

June 3, 2010 233 P.3d 357

Appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon and discharging a firearm out of a motor vehicle. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Defendant was convicted in a jury trial in the district court of second-degree murder with the use of a deadly weapon and discharging a firearm out of a motor vehicle. Defendant appealed. The supreme court, HARDESTY, J., held that: (1) findings of gunshot residue analyst were not admissible, and (2) State's failure to file adequate response to issue was considered confession of error.

Reversed and remanded.

[Rehearing denied July 30, 2010]

[En banc reconsideration denied September 3, 2010]

David M. Schieck, Special Public Defender, and *JoNell Thomas*, Deputy Special Public Defender, Clark County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *David J. Roger*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Giancarlo Pesci*, Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
   Under *Crawford v. Washington*, 541 U.S. 36 (2004), the testimonial statement of an otherwise unavailable witness is inadmissible unless the defendant had an opportunity to previously cross-examine the witness regarding the witness's statement. U.S. CONST. amend. 6.
2. CRIMINAL LAW.
   Findings of gunshot residue analyst in murder prosecution were not admissible under *Crawford v. Washington*, 541 U.S. 36 (2004), which stated that testimonial statement of an otherwise unavailable witness is

inadmissible unless defendant had an opportunity to previously cross-examine the witness regarding witness's statement, as analyst was unavailable to testify at trial and had never been subject to cross-examination by defendant. U.S. CONST. amend. 6.

3. CRIMINAL LAW.

Normally, when there is a violation of *Crawford v. Washington*, 541 U.S. 36 (2004), which holds that testimonial statement of an otherwise unavailable witness is inadmissible unless the defendant had an opportunity to previously cross-examine the witness regarding the witness's statement, the supreme court will review the prejudicial effects of the violation under a harmless-error analysis, which does not require reversal if the State can show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. U.S. CONST. amend. 6.

4. CRIMINAL LAW.

In determining whether to treat the failure to brief an issue as a confession of error, the supreme court recognizes that the consequences should be proportionate to the failure. NRAP 31(d).

5. CRIMINAL LAW.

State's failure to file adequate response to murder defendant's appeal based on alleged violation of his right to confrontation pertaining to findings of gunshot residue analyst was considered a confession of error; State failed to address defendant's argument that his constitutional right to confrontation was violated, issue was clearly raised in defendant's opening brief and reply brief, and even after being notified of failure to respond, State failed to supplement its response. U.S. CONST. amend. 6; NRAP 31(d).

Before HARDESTY, DOUGLAS and PICKERING, JJ.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we have the duty to publicly reiterate the importance of submitting attentive appellate briefs and the unfortunate obligation to address the unforgiving consequences resulting from a respondent's failure to respond to relevant issues raised on appeal. In his opening brief, appellant Levenral Polk argues that his constitutional right to confrontation under the Sixth Amendment of the United States Constitution and *Crawford v. Washington*, 541 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), was violated when the findings of a gunshot residue analyst who did not testify at trial and was not subject to cross-examination were admitted. In its answering brief, the State failed to directly address the *Crawford* and *Melendez-Diaz* issue or argue, alternatively, that any potential constitutional violation was harmless error. Polk argues in his reply that because the State failed to respond to Polk's alleged constitutional violation, it effectively confessed error under NRAP 31(d). We agree and reverse and remand for a new trial.

FACTS

In 1999, Polk was indicted for shooting and killing Walter Hodges at a bus stop in Las Vegas. Shots fired from a stationary vehicle struck Hodges, who was standing near the vehicle's passenger window. Witnesses subsequently saw the vehicle flee the scene with one occupant inside. The vehicle belonged to Leslie Harris, Polk's girlfriend, who had permitted Polk to use the vehicle on the night of the shooting.

During the investigation, detectives took forensic samples from the vehicle to be tested for gunshot residue. In preparation for Polk's trial, a total of five samples were tested by Michelle Fox, a gunshot residue analyst. Samples 1-3 were taken from the vehicle that investigators believed would contain gunshot residue, sample 4 was a ''control'' sample taken from the vehicle, and sample 5 was an unapplied piece of adhesive also tested as a ''control'' sample. The State did not receive the test results until the trial had already commenced. Therefore, Fox did not testify at trial and none of the gunshot residue samples were admitted as evidence. Polk was, nevertheless, convicted of first-degree murder with use of a deadly weapon and discharging a firearm out of a motor vehicle.

Eventually, the Ninth Circuit Court of Appeals determined that the jury instructions in Polk's trial were unconstitutional. *See Polk v. Sandoval*, 503 F.3d 903, 913 (9th Cir. 2007).[1] The court instructed the federal district court to grant Polk's petition for a writ of habeas corpus ''unless the State elect[ed] to retry Polk within a reasonable time.'' *Id*.

The State retried Polk in 2008. Prior to Polk's second trial, the State requested that certain gunshot residue samples be re-tested. Because Fox had retired and was unavailable for Polk's second trial, Laurie Kaminski re-tested samples 1 and 3 but did not re-test sample 2 or the ''control'' samples (samples 4 and 5). At trial, Kaminski was qualified as a gunshot residue expert and testified about her test results for samples 1 and 3. Over the objection of defense counsel, Kaminski was also permitted to testify regarding the test results of control sample 5, which had been previously tested by Fox but not Kaminski. Specifically, Kaminski testified that ''[Fox] reported finding no gunshot residue particles on that sample.'' At the conclusion of the second trial, Polk was convicted of second-degree murder with the use of a deadly weapon and discharging a firearm out of a motor vehicle.

In his current appeal, Polk asserts, among other issues, that admission of Fox's test results of sample 5 through Kaminski's testimony violated Polk's right to confront or cross-examine Fox under

---

[1]In *Nika v. State*, 124 Nev. 1272, 1285-87, 198 P.3d 839, 848-50 (2008), we disagreed with the Ninth Circuit Court of Appeals' reasoning and conclusion in *Polk*.

Crawford and *Melendez-Diaz*. In its answering brief, the State asserts that Kaminski's testimony was admissible because she was an expert witness offering her opinion, which may be based upon inadmissible evidence under NRS 50.285; however the State did not address *Crawford* or *Melendez-Diaz*, nor did it assert that any potential error was harmless. *See Medina v. State*, 122 Nev. 346, 355, 143 P.3d 471, 477 (2006) (recognizing that any potential prejudice from a *Crawford* violation will be reviewed under a harmless-error analysis). In his reply brief, Polk points out that the State's argument on the admissibility of hearsay testimony by an expert is limited to a statutory analysis of an expert witness's ability to testify and, in doing so, rely upon inadmissible evidence.[2] Polk argues that the State should be deemed to have confessed error by failing to respond to his argument concerning his constitutional right to confrontation under *Crawford* and *Melendez-Diaz*.

At oral argument, the State addressed for the first time Polk's alleged *Crawford* and *Melendez-Diaz* constitutional violations and asserted that the resulting error, if any, was harmless. When the court questioned the State about its failure to brief these constitutional issues, the State implored the court to consider the argument it was now making. Polk objected to the State being permitted to address the issue at oral argument when the State failed to respond to the issue in its answering brief.

DISCUSSION

[Headnote 1]

Under *Crawford*, the testimonial statement of an otherwise unavailable witness is inadmissible ''unless the defendant had an opportunity to previously cross-examine the witness regarding the witness's statement.'' *Medina*, 122 Nev. at 353, 143 P.3d at 476. During the course of this appeal, the United States Supreme Court issued an opinion in *Melendez-Diaz* and held that admitting the testimony of a forensic analyst through affidavits without being subject to cross-examination is a violation of the Confrontation Clause. 557 U.S. at 329.

[Headnotes 2, 3]

In this case, Fox was unavailable to testify at trial and had never been subject to cross-examination by Polk; therefore, her state-

---

[2]The State's answering brief acknowledges but does not defend Polk's Confrontation Clause challenge, saying only that ''Polk's constitutional right to confront witnesses was not violated by the trial court's decision to allow Kaminski to testify about the results of Fox's examination of Sample 5.'' This is insufficient to discharge a party's obligation to the court to provide legal authority and analysis, *see Smith v. Timm*, 96 Nev. 197, 201-02, 606 P.2d 530, 532(1980), an obligation the respondent shares with the appellant where, as here, the appellant presents a properly briefed and supported claim of error. *See* C. Wright, A. Miller, E. Cooper & C. Struve, *Federal Practice and Pro-*

ments or test results are not admissible under *Crawford*. To the extent that Fox's test results of sample 5 were admitted through Kaminski's testimony, we conclude that a *Crawford* and *Melendez-Diaz* violation occurred. Normally, when there is a *Crawford* violation, we will review the prejudicial effects of the violation under a harmless-error analysis, which does not require reversal if the State can '' 'show ''beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'' ' ''*Medina*, 122 Nev. at 355, 143 P.3d at 476-77 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967))); *see also Ennis v. State*, 122 Nev. 694, 702, 137 P.3d 1095, 1101 (2006). Until oral argument, however, the State failed to brief any constitutional issues remotely related to a *Crawford* violation and failed to assert that any potential *Crawford* violation was harmless.

[Headnote 4]

We previously stated that we ''expect[ ] all appeals to be pursued with high standards of diligence, professionalism, and competence,'' *Barry v. Lindner*, 119 Nev. 661, 671, 81 P.3d 537, 543 (2003), and that '' '[w]e intend to impress upon the members of the bar our resolve to end . . . lackadaisical [appellate] practices.' '' *Id*. at 672, 81 P.3d at 544 (quoting *Smith v. Emery*, 109 Nev. 737, 743, 856 P.2d 1386, 1390 (1993)). NRAP 31(d) is a discretionary rule providing that if a respondent fails to file an adequate response to an appeal, this court may preclude that respondent from participating at oral argument and consider the failure to respond as a confession of error.[3] In determining whether to treat the failure to brief an issue as a confession of error under NRAP 31(d), we recognize that the consequences should be proportionate to the failure. *See Gross v. Town of Cicero, Illinois*, 528 F.3d 498, 500 (7th Cir. 2008) (noting that in applying sanction for noncompliance with rules of appellate procedure, ''it is important to match the sanction to the offense'').

We have routinely invoked our discretion and enforced NRAP 31(d) when no answering brief has been filed. *See County Comm'rs v. Las Vegas Discount Golf*, 110 Nev. 567, 569-70, 875

---

cedure § 3974.2, at 274 (4th ed. 2008) (''[A respondent] who fails to include and properly argue a contention in the [respondent's] brief takes the risk that the court will view the contention as forfeited.''). Furthermore, the State's general assertion does not address the harmless error point, as to which the State bears the burden of proving that the error was harmless.

[3]NRAP 31(d) states, in pertinent part:

> If a respondent fails to file an answering brief, respondent will not be heard at oral argument except by permission of the court. The failure of respondent to file a brief may be treated by the court as a confession of error and appropriate disposition of the appeal thereafter made.

P.2d 1045, 1046 (1994); *State of Rhode Island v. Prins*, 96 Nev. 565, 566, 613 P.2d 408, 409 (1980). We have also determined that a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal. *See Bates v. Chronister*, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (treating the respondent's failure to respond to the appellant's argument as a confession of error); *A Minor v. Mineral Co. Juv. Dep't*, 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (determining that the answering brief was silent on the issue in question, resulting in a confession of error); *Moore v. State*, 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that even though the State acknowledged the issue on appeal, it failed to supply any analysis, legal or otherwise, to support its position and ''effect[ively] filed no brief at all,'' which constituted confession of error), *overruled on other grounds by Miller v. State*, 121 Nev. 92, 95-96, 110 P.3d 53, 56 (2005). We have also concluded that confession of error occurred when a respondent has inexcusably disregarded applicable appellate procedures or court orders. *See Walport v. Walport*, 98 Nev. 301, 302, 646 P.2d 1215, 1215 (1982) (treating the respondent's failure to comply with two orders from this court to obtain counsel and file a brief as a confession of error); *State, Dep't Mtr. Vehicles v. Palmer*, 96 Nev. 599, 600, 614 P.2d 5, 5 (1980) (determining that the respondent's failure to comply with a court order to file a brief or request an extension warranted treating respondent's conduct as a confession of error).

However, we have elected not to apply NRAP 31(d) on occasions when the respondent has filed a response but inadvertently failed to respond to an inconsequential issue or had a recognizable excuse. *See Hewitt v. State*, 113 Nev. 387, 392, 936 P.2d 330, 333 (1997) (concluding that even though the State failed to address all of the appellant's issues, the issues were meritless and were being raised for the first time on appeal), *overruled on other grounds by Martinez v. State*, 115 Nev. 9, 11-12, 974 P.2d 133, 134-35 (1999); *State ex rel. Welfare Div. v. Hudson*, 97 Nev. 386, 388, 632 P.2d 1148, 1149 (1981) (refusing to adopt a confession of error when the respondent was not represented by counsel), *superseded by statute on other grounds as recognized in Smith v. County of San Diego*, 109 Nev. 302, 303, 849 P.2d 286, 287 (1993).

[Headnote 5]

We recognize that the State filed a lengthy answering brief addressing Polk's other issues on appeal; however, the State failed to address Polk's argument that his constitutional right to confrontation under *Crawford* and *Melendez-Diaz* was violated. This is a significant constitutional issue that compels a response. The issue was clearly raised in Polk's opening brief and reply brief, the ar-

gument regarding it collectively consisting of approximately four pages. *Melendez-Diaz* was decided on June 25, 2009. The State filed its answering brief six weeks later, on September 10, 2009. In Polk's reply brief, he explicitly referenced the State's failure to directly address the constitutional issue. Even after being notified of its failure to respond to the *Crawford* and *Melendez-Diaz* issue, the State failed to supplement its response and elected to wait until oral argument to address the constitutional issue or harmless error. Such appellate practice causes prejudice to Polk's ability to adequately prepare for or respond during oral argument.

Accordingly, we grant Polk's oral motion to exclude the State's oral argument on the *Crawford* and *Melendez-Diaz* issues and disregard the State's argument. Because the constitutional right to confrontation under *Crawford* and *Melendez-Diaz* was repeatedly raised throughout the appeal, but the State failed to address or even assert that any potential violation was harmless error, we invoke our authority under NRAP 31(d) and consider the State's silence to be a confession of error on this issue.[4]

Accordingly, we reverse the judgment of conviction and remand this matter to the district court for a new trial.

DOUGLAS and PICKERING, JJ., concur.

---

[4]Polk also asserts on appeal that the district court improperly dismissed a juror who was using prescription narcotics without first consulting the parties, the district court failed to dismiss a juror who lost consciousness during the trial, the prosecutor committed prosecutorial misconduct, the district court improperly qualified an expert witness, the enhanced weapons statute is unconstitutional, and cumulative error was prejudicial. Given our conclusion that the State confessed error regarding Polk's Confrontation Clause claim, we do not reach the merits of these other claims.

GREAT BASIN WATER NETWORK, A NONPROFIT ORGANIZATION; DEFENDERS OF WILDLIFE, A NONPROFIT CORPORATION; EDGAR ALDER; CLARK W. MILES; RAYMOND E. TIMM; THEODORE STAZESKI; SHELDON M. EDWARDS; KATHRYN HILL; KENNETH F. HILL; SCOTTY HEER; BETH B. ANDERSON; SUSAN L. GEARY; DONALD W. GEARY; ROBERT EWING; PAMELA JENSEN; BRUCE JENSEN; RENEE A. ALDER; ROBERT J. NICKERSON; JOYCE B. NICKERSON; EDWARD J. WEISBROT; ALEXANDER ROSE, EXECUTIVE DIRECTOR OF THE LONG NOW FOUNDATION; ROBERT N. KRANOVICH; PAMELA M. PEDRINI; RICK HAVENSTRITE; TERRENCE P. MARASCO; BRYAN HAMILTON; JOHN B. WOODYARD, II; LAURIE E. CRUIKSHANK; DONALD FOSS; SELENA L. WEAVER; MARY E. COLLINS; CANDI A. ASHBY; SALLY L. GUST; BRUCE ASHBY; DANIEL MAES; ROBERT N. MARCUM; TARA FOSTER; DONALD A. DUFF; ELISABETH A. DOUGLASS; JAMIE DENERIS; NOMI MARTIN-SHEPPARD; VERONICA F. DOUGLASS; ABIGAIL C. JOHNSON; MARIE JORDAN; JAMES JORDAN; RUTHERFORD DAY; THE GREAT BASIN CHAPTER OF TROUT UNLIMITED; WILDA GARBER; THE UTAH COUNCIL OF TROUT UNLIMITED; PANDORA WILSON; PARKER DAMON; CAROL DAMON; ANNA HECKETHORN; AND DEBORAH TORVINEN, APPELLANTS, *v.* TRACY TAYLOR, IN HIS OFFICIAL CAPACITY AS THE NEVADA STATE ENGINEER; THE STATE OF NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES; AND THE SOUTHERN NEVADA WATER AUTHORITY, RESPONDENTS.

No. 49718

June 17, 2010 234 P.3d 912

Petition for rehearing of *Great Basin Water Network v. State Eng'r*, 126 Nev. Adv. Op. No. 2, 222 P.3d 665 (2010),* an appeal from a district court order denying a petition for judicial review in a water rights action. Seventh Judicial District Court, White Pine County; Norman C. Robison, Judge.

Regional water authority filed applications with State Engineer to appropriate public water from groundwater sources in 1989. Protestants later filed petition with State Engineer requesting that Engineer re-notice applications and reopen the protest period.

***Reporter's Note:** The prior opinion was withdrawn from publication before it was printed in the *Nevada Reports*.

State Engineer denied petition. Protestants filed petition for judicial review. The district court denied petition and protestants appealed. The supreme court, HARDESTY, J., held that: (1) State Engineer violated his statutory duty to timely act on applications, (2) statutory amendment allowing State Engineer to postpone action on pending applications did not apply retroactively to applications in the case, and (3) proper and most equitable remedy for untimely ruling on applications was for State Engineer to re-notice applications and reopen protest period.

Rehearing granted in part; opinion withdrawn; reversed and remanded.

Leah R. Wigren, Reno; *Simeon Herskovits*, Taos, New Mexico; *Matthew K. Bishop*, Helena, Montana; *Brian Segee*, Washington, D.C., for Appellants.

Catherine Cortez Masto, Attorney General, and *Bryan L. Stockton*, Deputy Attorney General, Carson City, for Respondents State Engineer and Division of Water Resources.

Taggart & Taggart, Ltd., and *Paul G. Taggart* and *Joseph C. Reynolds*, Carson City; *Dana R. Smith*, Las Vegas; *Lewis and Roca LLP* and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas; *Holland & Hart, LLP*, and *J. Stephen Peek*, Las Vegas, for Respondent Southern Nevada Water Authority.

1. APPEAL AND ERROR.
   Supreme court reviews a district court's statutory construction determination de novo.
2. WATER LAW.
   State Engineer violated his statutory duty to timely act on applications to appropriate public water from groundwater sources pursuant to 1989 version of statute governing applications to State Engineer, where State Engineer failed to act on applications within one year of the closing of protest period, State Engineer did not request written authorization to postpone action, and State Engineer did not state that a water supply study or pending court action necessitated postponement of action. NRS 533.370 (1989).
3. WATER LAW.
   Groundwater appropriation applications made approximately 14 years earlier were not pending at time of statutory amendment allowing State Engineer to postpone action on pending applications made for municipal use, and therefore, amendment did not apply retroactively to applications and State Engineer was not authorized to postpone a ruling without approval from applicant and protestants; there was no language in statute or legislative history indicating a legislative intent that amendment apply retroactively to applications made more than one year prior to amendment's enactment, prior version of statute mandated that State Engineer rule on application within one year, amendment did not contain a clear indication of retroactive effect, and there was no indication that Legislature

intended amendment to apply to every groundwater appropriation application ever filed with State Engineer. NRS 533.370(2).

4. STATUTES.
   To determine legislative intent, supreme court will not go beyond a statute's plain language if the statute is facially clear.
5. STATUTES.
   An ambiguous statute is one that is capable of more than one reasonable interpretation.
6. STATUTES.
   When a statute is ambiguous, supreme court determines the Legislature's intent by evaluating the legislative history and construing the statute in a manner that conforms to reason and public policy.
7. STATUTES.
   Supreme court avoids statutory interpretation that renders language meaningless or superfluous.
8. STATUTES.
   Whenever possible, supreme court interprets statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.
9. STATUTES.
   Declarations of intent by a subsequent legislature, especially those occurring after commencement of litigation concerning a disputed statute, are entitled to little if any weight.
10. WATER LAW.
    In circumstances in which a protestant filed a timely protest of application to appropriate public water from groundwater sources and/or appealed the State Engineer's untimely ruling on application, the proper and most equitable remedy is that the State Engineer must re-notice the application and reopen the protest period. NRS 533.365.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

On January 28, 2010, this court issued an opinion in this appeal reversing the district court's denial of appellants' petition for judicial review. Thereafter, respondents Southern Nevada Water Authority (SNWA) and the State Engineer (collectively, respondents) filed petitions for rehearing pursuant to NRAP 40. We will consider rehearing when we have overlooked or misapprehended material facts or questions of law or when we have overlooked, misapplied, or failed to consider legal authority directly controlling a dispositive issue in the appeal. NRAP 40(c)(2). Having reviewed the briefing associated with respondents' petitions for rehearing, we conclude that rehearing is warranted, in part. We grant, in part, the State Engineer's petition for rehearing with respect to the State Engineer's request that we clarify that this opinion applies to protested applications. Additionally, we grant, in part, SNWA's pe-

tition for rehearing with respect to SNWA's request that we undertake the determination of the proper remedy in this case. We withdraw our January 28, 2010, opinion and issue this opinion in its place.

In this appeal, we must determine two narrow, yet fundamental questions: whether the State Engineer violated his statutory duty under NRS 533.370(2) by failing to rule on SNWA's 1989 water appropriation applications within one year and, if so, what is the proper remedy for his violation of his statutory duty. NRS 533.370(2), as it existed in 1989, required the State Engineer to approve or reject each water appropriation application within one year after the final protest date. The State Engineer, however, could postpone taking action beyond one year if he obtained written authorization from the applicant and protestants or if there was an ongoing water supply study or court action. None of those conditions occurred by the end of 1991. However, in 2003, the Legislature amended NRS 533.370 to permit the State Engineer to postpone action on pending applications made for a municipal use. The district court summarily determined, among other issues, that the amendment applied to SNWA's 1989 applications, thus enabling the State Engineer to take action on applications filed 14 years earlier.

The parties to this appeal dispute whether SNWA's 1989 applications were ''pending'' in 2003 under the legislative amendment and, therefore, whether the amendment applied retroactively to those applications. We conclude that ''pending'' applications are those that were filed within one year prior to the enactment of the 2003 amendment. And, in the absence of statutory language and legislative history demonstrating an intent that the amendment apply retroactively to SNWA's 1989 applications, we determine that the State Engineer could not take action on the protested applications under the 2003 amendment to NRS 533.370.

Because we determine that the 1989 water appropriation applications were not pending in 2003, we conclude that the State Engineer violated his statutory duty by failing to take action within one year after the final protest date. Based on the State Engineer's failure to act on the applications in this case, we further conclude that an equitable remedy is warranted. We determine that the State Engineer must re-notice SNWA's 1989 applications and reopen the period during which appellants may file protests. Thus, we reverse the order of the district court and remand the matter to the district court with instructions to remand the matter to the State Engineer for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

In 1989, the Las Vegas Valley Water Department (LVVWD) filed approximately 146 applications with the State Engineer to ap-

propriate public water from groundwater sources in various areas in Nevada. LVVWD's intended purpose was to pump the water to the greater Las Vegas area. With nearly 800,000 acre-feet per year of groundwater at issue, the State Engineer referred to the project as ''the largest interbasin appropriation and transfer of water ever requested in the history of the state of Nevada.''[1]

In 1990, the State Engineer published statutory notice of the applications in the counties in Nevada where the water was to be appropriated. In response, more than 830 protests were filed with the State Engineer. Although NRS 533.370(2), as it existed at the time, required the State Engineer to take action on applications within one year after the close of the protest period, unless he identified an ongoing water study or court action, the State Engineer did not rule on the applications at issue in this case or identify an exception that permitted postponement of action within the allotted time.

In 1991, SNWA was formed to address and secure the water needs for the millions of residents of and visitors to the Las Vegas valley. SNWA acquired LVVWD's rights to the 1989 groundwater applications as a successor in interest. Thereafter, between 1991 and 2002, LVVWD withdrew some of the 1989 applications, and the State Engineer held hearings and issued rulings on several other 1989 applications. This appeal concerns 34 of SNWA's remaining 1989 groundwater applications in the Spring, Snake, Cave, Dry Lake, and Delamar Valleys. Although there are 54 appellants to this appeal, we have identified five groups of appellants. First, there are 11 ''original protestants,'' who filed original protests in 1989 and 1990, but argue that because of the 16-year delay following the filing of the applications, they did not receive adequate notice of the 2005 prehearing conference or the 2006 hearings. Second, there are the ''new'' property owners, who moved to or established themselves in affected valleys after 1989. Third, there are five property owners who either inherited or purchased their property interest from an original protestant. Fourth, there are residents of Utah who live on the Utah side of Snake Valley, and argue that they never received notice of the applications in 1989 and thus did not file protests. Fifth, there are at least three national environmental and wildlife organizations that have evolved since 1989, and argue that the State Engineer has effectively blocked them from protecting their interests because they did not file protests in 1989 and 1990.

In October 2005, the State Engineer notified roughly 300 people by certified mail that a prehearing conference would be held in January 2006 to discuss issues related to protest hearings on the 34

---

[1]The quantity of water proposed to be pumped was later reduced to approximately 190,000 acre-feet per year.

groundwater applications. Hundreds of the certified mailings were returned undelivered, including mailings to 11 of the appellants in this case. The State Engineer did not attempt to resend the mailings or follow up on those mailings that were returned. At the January 2006 prehearing conference, the State Engineer heard from people who filed formal protests in 1989,[2] along with others who expressed public comment.[3] Because of the 16-year lapse between the filing of the applications and the hearings on the applications, some attendees, including appellant Abigail Johnson, through her attorney, requested that the State Engineer re-notice SNWA's applications and reopen the protest period.

In March 2006, the State Engineer issued an order denying the request to re-notice the applications and scheduled a September 2006 hearing for applications concerning the Spring Valley water basin. The State Engineer recognized the significant lapse of time between the filing of the applications and the hearings and acknowledged that the delay signified to the public that SNWA did not intend to pursue the pumping project. However, the State Engineer also found that, without the public's knowledge, SNWA had been dedicating substantial time to prepare for hearings on the applications. SNWA explained that the magnitude of the groundwater project and the number of protests required significant preparation during the 1990s and early 2000s. However, neither the State Engineer nor SNWA offered evidence that a water study had been ordered or that the applicant and protestants authorized the State Engineer to postpone taking action on the 1989 applications.

In July 2006, appellants filed a petition with the State Engineer, requesting, in part, that the State Engineer re-notice SNWA's remaining applications from 1989 and reopen the protest period. The State Engineer summarily denied the petition, reasoning that it was analogous to a request for reconsideration under NRS 622A.390, and reconsideration was not warranted.

In August 2006, appellants filed a petition for judicial review with the district court, seeking review of the State Engineer's order denying the request to re-notice SNWA's applications. In May 2007, the district court denied the petition for judicial review. The district court determined that the State Engineer did not abuse his discretion in denying the request because there is no statutory provision that requires or authorizes additional notice of water ap-

---

[2]Only one appellant in this case, Abigail Johnson, participated as a protestant at the January 2006 prehearing conference because she had protested the Spring Valley applications in 1989. However, in this appeal, she is also a new property owner because now she seeks to also protest the Snake Valley applications.

[3]Only one appellant in this case, Nomi Martin-Sheppard, provided public comment at the January 2006 prehearing conference.

propriation outside of the statutory time period. Citing the 2003 legislative amendment to NRS 533.370(2)—the statute that requires the State Engineer to take action on an application within one year—the district court stated that Nevada water law takes into account a time lapse between the original filing of an application and a hearing.

In April 2007, while the petition for judicial review was pending in the district court, the State Engineer ruled on the applications that concerned the Spring Valley water basin. The State Engineer upheld some protests and overruled others. Of the 54 appellants to this appeal, one participated in the Spring Valley hearing. No petition for judicial review was filed concerning the State Engineer's April 2007 Spring Valley order, but appellants filed this appeal of the district court's May 2007 denial of the August 2006 petition for judicial review.

DISCUSSION

[Headnote 1]

Appellants appeal the district court's denial of the petition for judicial review on multiple grounds, only one of which is pertinent to our disposition. The determinative issue in this appeal is whether SNWA's 1989 groundwater appropriation applications were still pending before the State Engineer in 2003, despite the State Engineer's failure to take action on them within one year of the closing of the protest period, as required by the former version of NRS 533.370(2). In denying appellants' petition for judicial review, the district court interpreted the 2003 version of NRS 533.370 to apply retroactively to the 1989 applications.[4] We disagree.[5] We review a district court's statutory construction determination de novo. *Sonia F. v. Dist. Ct.*, 125 Nev. 495, 499, 215 P.3d 705, 707 (2009).

NRS 533.370 as it existed in 1989

Appellants argue that the State Engineer violated his statutory duty because he did not rule on SNWA's 1989 applications within one year after the final date for filing a protest and that the district court erred in failing to address this argument when it was raised below.

In 1989, NRS 533.370(2) required the State Engineer to take action on water appropriation applications within one year after the final date for filing a protest, subject to three exceptions:

---

[4]NRS 533.370 has been amended twice since 2003, but such amendments do not substantively affect the provision at issue in this case.

[5]Because we reverse and remand on the issue of statutory construction, we do not reach the merits of appellants' other arguments on appeal.

> The state engineer *shall* either approve or reject each application within 1 year after the final date for filing protest. However:
>
> (a) Action can be postponed by the state engineer upon written authorization to do so by the applicant or, in case of a protested application, by both the protestant and the applicant; and
>
> (b) In areas where studies of water supplies are being made *or* where court actions are pending, the state engineer may withhold action.

(Emphases added.)

[Headnote 2]

This court has determined that '' '[t]he word ''shall'' is a term of command; it is imperative or mandatory, not permissive or directory.' '' *Blaine Equip. Co. v. State, Purchasing Div.*, 122 Nev. 860, 867, 138 P.3d 820, 824 (2006) (alteration in original) (quoting *Adkins v. Oppio*, 105 Nev. 34, 37, 769 P.2d 62, 64 (1989)). Therefore, we conclude that the State Engineer violated his duty by failing to act on the applications within one year of the closing of the protest period, unless, pursuant to the 1989 version of NRS 533.370(2)(a) or (b), the State Engineer properly postponed action on the applications beyond the one-year statutory requirement.

The State Engineer did not request written authorization to postpone action

In 1989, NRS 533.370(2)(a) permitted the State Engineer to postpone action on water appropriation applications if he received written authorization from the applicant and any protestants to the applications. Appellants assert that the State Engineer neither sought nor received written authorization from SNWA or any protestants to the 1989 applications to postpone action. Neither the State Engineer nor SNWA dispute appellants' assertion.[6] Because no evidence in the record indicates that the State Engineer obtained written authorization from either SNWA or the protestants, we conclude that the 1989 version of NRS 533.370(2)(a) did not provide a basis for postponement of action on the applications.

The State Engineer did not state that a water supply study or pending court action necessitated postponement of action

The State Engineer was also permitted to postpone action on SNWA's applications if a water supply study was being conducted

[6]SNWA argues that it would have been ''unreasonable and unworkable'' to require the State Engineer to obtain written authorization from the over 800 protestants in 1989. However, SNWA's impracticability argument does not alter the fact that a plain reading of the 1989 version of NRS 533.370(2)(a) required such authorization.

or a court action on the applications was pending in 1989. *See* NRS 533.370(2)(b) (1989). Appellants contend that neither a water supply study nor a court action had occurred by 1991. SNWA concedes that there was no court action; however, SNWA argues that the State Engineer determined that a hydrologic study was necessary before taking action on the applications.

To support its argument, SNWA directs this court to two rulings made by the State Engineer in 2001 and 2002 regarding various 1989 applications seeking to appropriate water from basins and aquifers in other regions of Nevada. There is no evidence in the record to indicate that the State Engineer postponed action on the applications at issue in this appeal by 1991 because of the need for hydrologic studies. Consequently, we determine that the State Engineer's delay in taking action was not excused pursuant to the 1989 version of NRS 533.370(2)(b).

The 2003 legislative amendment to NRS 533.370 does not apply retroactively to the 1989 applications

[Headnote 3]

Appellants contend that a 2003 amendment to NRS 533.370 that allows the State Engineer to postpone action on groundwater appropriation applications made for municipal use does not apply retroactively and, thus, the State Engineer must re-notice SNWA's 1989 applications and reopen the protest period. SNWA maintains that the 2003 amendment does apply retroactively, thus excusing the State Engineer's failure to comply with NRS 533.370 as it existed prior to the 2003 amendment.[7]

In 2003, the Legislature amended NRS 533.370 to permit the State Engineer to postpone action on applications made for municipal purposes. *See* 2003 Nev. Stat., ch. 474, § 2, at 2980-81. Importantly, the Legislature specified the following water appropriation applications to which the amendment in NRS 533.370(2) applies: ''1. Each application . . . that is made on or after July 1, 2003; and 2. Each such application that is *pending* with the office of the State Engineer on July 1, 2003.'' *Id.* § 18, at 2989 (emphasis added).

Therefore, because SNWA's applications were made for municipal use, and the State Engineer did not rule on SNWA's 1989 applications within one year after the final date for filing a protest, we must determine whether SNWA's 1989 applications were pending in 2003. If the applications were pending, the State Engineer would have been statutorily authorized to postpone a ruling without approval from SNWA and the protestants.

---

[7]Perplexingly, the State Engineer failed, in his answering brief, to address the determinative issue of whether the 2003 amendment applies retroactively and, instead, placed blame on appellants for not ''complain[ing] about the delay until now.''

Appellants argue that the 1989 applications were not pending in 2003 because they effectively lapsed one year after the protest period ended. They assert that the reasonable interpretation of the term ''pending,'' as used by the Legislature in regard to the application of the 2003 amendment to NRS 533.370, is that only applications filed within one year of the amendment's enactment in 2003 are still before the State Engineer. SNWA argues that the 1989 applications were pending because the Legislature intended that the municipal-use exception apply retroactively. SNWA infers this legislative intent from the fact that the Legislature included a provision specifying that the amendment applied to pending applications, instead of specifying only prospective application of the amendment.

[Headnotes 4-8]

To determine legislative intent, this court will not go beyond a statute's plain language if the statute is facially clear. *Bacher v. State Engineer*, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006). An ambiguous statute is one that is capable of more than one reasonable interpretation. *Id*. at 1117-18, 146 P.3d at 798. When a statute is ambiguous, this court determines the Legislature's intent by evaluating the legislative history and construing the statute in a manner that conforms to reason and public policy. *Attorney General v. Nevada Tax Comm'n*, 124 Nev. 232, 240, 181 P.3d 675, 681 (2008). This court ''avoids statutory interpretation that renders language meaningless or superfluous.'' *Karcher Firestopping v. Meadow Valley Contr.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009). Whenever possible, we interpret ''statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.'' *Allstate Insurance Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009).

[Headnote 9]

Appellants' and SNWA's arguments demonstrate that the effective date applicable to the amendment made in subsection 2 of the 2003 version of NRS 533.370 regarding pending groundwater appropriation applications is ambiguous because it is susceptible to more than one reasonable interpretation. Thus, we first turn to the legislative history to determine legislative intent. After examining the legislative history, it is clear that SNWA requested the 2003 municipal-use amendment, but, unfortunately, the legislative history provides no guidance regarding retroactive effect of the amendment to *pending* applications. *See* Hearing on S.B. 336 Before the Assembly Comm. on Natural Resources, Agriculture, and Mining, 72d Leg. (Nev., April 30, 2003); *see also* Hearing on

S.B. 336 Before the Senate Comm. on Natural Resources, 72d Leg. (Nev., March 26, 2003).[8]

We next consider legislative intent by construing the statute in a manner consistent with reason and public policy. Although the retroactive effect of NRS 533.370(2) evidences the Legislature's intent that the statute apply to applications for municipal use that were filed prior to the enactment of the amendment, we conclude that appellants' interpretation of the word ''pending'' is the more reasonable one for four reasons.

First, by setting a timeline for the approval or rejection of groundwater appropriation applications within one year in NRS 533.370(2), we determine that the Legislature intended to prevent a significant lapse of time before a ruling. There is no language in the statute or the legislative history that indicates an intention by the Legislature that the amendment for municipal use apply retroactively to applications made more than one year prior to the amendment's enactment. Requiring approval to postpone an application from both the applicant and the protestant demonstrates that the Legislature recognizes the significant interests of both parties and intended to ensure that both parties receive adequate notice of the postponement of action on applications. Therefore, without the Legislature's explicit intent to the contrary, it would be inequitable to allow applications to linger for years without obtaining the parties' written authorization to postpone action or providing adequate notice of the initiation of hearings on stale applications.

Second, the 1989 version of NRS 533.370(2) mandated that the State Engineer rule on an application within one year, and the

---

[8]For unknown reasons, SNWA failed to address any legislative history until its petition for rehearing. Regardless, we conclude that the legislative history to which SNWA cites in its petition for rehearing, including episodic comments by legislators during various legislative sessions between 1991 and 2003, does not support its contention that the 2003 Legislature intended the 2003 amendment to apply retroactively. Moreover, we recognize that ''prior legislative history is a hazardous basis for inferring the intent of a subsequent [Legislature].'' *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 508 (2d Cir. 2005).

Similarly, the court is mindful of presentments to the Legislature during the recent 26th Special Session seeking clarification of the legislative intent behind the 2003 amendment to NRS 533.370. The court cautions against such action, as ''subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' [Legislature].'' *Pension Benefit Guaranty Corp. v. The LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). Declarations of intent by a subsequent Legislature, especially those occurring after commencement of this litigation, are ''entitled to little if any weight.'' *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977). We are concerned here about the intent of the Legislature that amended NRS 533.370 in 2003, not the intent of a previous or subsequent Legislature. *See id.*

2003 amendments do not contain a clear indication of retroactive effect. Thus, to determine that there would be no consequence for not issuing a ruling within one year would render the statutory timeline superfluous.

Third, a reading consistent with SNWA's interpretation of the 2003 amendment would deprive at least 11 appellants who are original protestants of SNWA's 1989 applications of their due process right to grant or withhold authorization to postpone action by the State Engineer on the 1989 applications. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982).

Fourth, there is no indication that the Legislature intended that the 2003 amendment to NRS 533.370(2) apply to every groundwater appropriation application ever filed in the office of the State Engineer. Such an interpretation would produce absurd results. Rather, in reading the statutory provisions together, the more reasonable interpretation of ''pending'' is that it refers to those applications in which the one-year period for the State Engineer to take action had not yet elapsed. Because the period had not occurred, the State Engineer would have been able to postpone action based on one of the exceptions in NRS 533.370(2). We therefore conclude that the Legislature intended to designate as ''pending'' on July 1, 2003, only those applications in which the one-year period under NRS 533.370(2) had not arrived. We determine that the 2003 amendment to NRS 533.370(2) does not apply retroactively and that the district court erred when it found that the 2003 amendment applied to SNWA's 1989 applications. Therefore, we conclude that the State Engineer violated his statutory duty by failing to rule on SNWA's 1989 applications within one year of the close of the protest period.

Remedy for the State Engineer's failure to rule on SNWA's applications within one year of the close of the protest period

We conclude that the State Engineer violated his statutory duty by ruling on applications well beyond the one-year statutory limitation without first properly postponing action.[9] Therefore, the district court erred in denying appellants' petition for judicial review. In the absence of a statutory remedy for noncompliance with the timing requirements of NRS 533.370, we must determine the proper remedy. Both parties posit that a proper remedy may be that the State Engineer should re-notice and reopen the protest period.[10]

---

[9]We note that the record on appeal demonstrates that the State Engineer has ruled on the Spring Valley applications. The State Engineer held hearings on the Delamar, Dry Lake, and Cave Valley applications in February 2008, and a hearing on the Snake Valley applications has not been scheduled.

[10]For the first time on appeal, appellants request, as an alternative remedy, that SNWA be required to file new applications. We decline to consider ap-

We have previously recognized the district court's power to grant equitable relief when water rights are at issue. *See, e.g.*, *Engelmann v. Westergard*, 98 Nev. 348, 647 P.2d 385 (1982); *State Engineer v. American Nat'l Ins. Co.*, 88 Nev. 424, 498 P.2d 1329 (1972). Additionally, in *Bailey v. State of Nevada*, a water permit cancellation case, this court expanded the equitable relief granted by the district court, impliedly recognizing our ability also to award equitable relief. 95 Nev. 378, 383, 594 P.2d 734, 737 (1979). We take this opportunity to confirm that this court has the power to grant equitable relief in water law cases.

Voiding the State Engineer's ruling and preventing him from taking further action would be inequitable to SNWA and future similarly situated applicants. And applicants cannot be punished for the State Engineer's failure to follow his statutory duty. Similarly, it would be inequitable to the original and subsequent protestants to conclude that the State Engineer's failure to take action results in approval of the applications over 14 years after their protests were filed. Thus, we cannot conclude that the State Engineer's inaction deems the applications either approved or rejected. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (stating that '' 'if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction' '' (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993))).

[Headnote 10]

Instead, we conclude that, in circumstances in which a protestant filed a timely protest pursuant to NRS 533.365 and/or appealed the State Engineer's untimely ruling, the proper and most equitable remedy is that the State Engineer must re-notice the applications and reopen the protest period. Accordingly, we reverse the district court's order denying appellants' petition for judicial review and remand the matter to the district court with instructions to, in turn, remand the matter to the State Engineer for further proceedings consistent with this opinion.

PARRAGUIRRE, C.J., and DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

---

pellants' untimely request. *See State, Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) (stating that ''this court generally will not consider arguments that a party raises for the first time on appeal'').

KEVIN RAY BUCKWALTER, M.D.; AND KEVIN RAY BUCKWALTER, M.D., LTD., PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE DOUGLAS HERNDON, DISTRICT JUDGE, RESPONDENTS, AND DONALD L. BAILE, INDIVIDUALLY AS SPOUSE AND HEIR, AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF BARBARA ANN BAILE, DECEASED; AND DEBRA BAILE, INDIVIDUALLY AS DAUGHTER, REAL PARTIES IN INTEREST.

No. 55133

June 24, 2010 234 P.3d 920

Original petition for a writ of mandamus or prohibition challenging a district court order denying a motion to dismiss a medical malpractice action.

The supreme court, PICKERING, J., held that statute requiring dismissal of any medical malpractice action filed without an affidavit submitted by a medical expert imposes an affidavit requirement, which litigant can meet either by sworn affidavit or unsworn declaration made under penalty of perjury.

Petition denied.

John H. Cotton & Associates, Ltd., and *John H. Cotton* and *Paul J. Hofmann*, Las Vegas, for Petitioners.

White & Wetherall, LLP, and *Peter C. Wetherall*, Las Vegas, for Real Parties in Interest.

1. MANDAMUS; PROHIBITION.
   Normally, supreme court will not entertain a petition for a writ of mandamus or prohibition challenging the denial of a motion to dismiss, but supreme court may do so where the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law.
2. AFFIDAVITS.
   An affidavit is a written statement sworn to by the declarant before an officer authorized to administer oaths.
3. STATUTES.
   Statutes must be construed together so as to avoid rendering any portion of a statute immaterial or superfluous.
4. HEALTH.
   Statute requiring dismissal of any medical malpractice action filed without an affidavit submitted by a medical expert imposes an affidavit requirement, which litigant can meet either by sworn affidavit or unsworn declaration made under penalty of perjury, in light of statute stating that any matter whose existence or truth may be established by an affidavit may be established with the same effect by an unsworn declaration of its

existence or truth signed by the declarant under penalty of perjury. NRS 41A.071, 53.045.

Before HARDESTY, DOUGLAS and PICKERING, JJ.

OPINION

By the Court, PICKERING, J.:

This original writ proceeding asks us to decide whether a medical expert's declaration under penalty of perjury as provided in NRS 53.045 can satisfy the affidavit requirement stated in NRS 41A.071. We agree with the district court that it can and therefore deny writ relief.

I.

This is a medical malpractice action. The plaintiffs supported their complaint with the expert proof NRS 41A.071 requires but did so by declaration rather than affidavit. The defendants moved to dismiss on the grounds that NRS 41A.071 requires an ''affidavit'' and says nothing about declarations. The plaintiffs countered that under NRS 53.045, a declaration can do anything an affidavit can so long as the declarant subscribes to the statement that, ''I declare under penalty of perjury that the foregoing is true and correct,'' which theirs did.

[Headnote 1]

The district court denied the motion to dismiss. This petition for a writ of prohibition or mandamus followed. Normally, this court will not entertain a writ petition challenging the denial of a motion to dismiss but we may do so where, as here, the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law. *Smith v. District Court*, 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997).

II.

This proceeding requires us to interpret two statutes: NRS 41A.071 and NRS 53.045. The former requires dismissal of any medical malpractice action ''filed without an affidavit, supporting the allegations contained in the action, submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice.'' NRS 41A.071. The latter provides that

> [a]ny matter whose existence or truth may be established by an affidavit . . . may be established with the same effect by

> an unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially the following form: . . . ''I declare under penalty of perjury that the foregoing is true and correct.''

NRS 53.045.

[Headnote 2]

An affidavit is a written statement ''sworn to by the declarant before an officer authorized to administer oaths.'' *Black's Law Dictionary* 66 (9th ed. 2009). A declaration under NRS 53.045 is not sworn, but instead is dated and signed under penalty of perjury. Petitioners contend that because NRS 41A.071 expressly requires an affidavit, the complaint must be dismissed. We disagree.

[Headnotes 3, 4]

Statutes must be construed together so as to avoid rendering any portion of a statute immaterial or superfluous. *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006). NRS 41A.071 imposes an affidavit requirement, which NRS 53.045 permits a litigant to meet either by sworn affidavit or unsworn declaration made under penalty of perjury. *See State, Dep't Mtr. Veh. v. Bremer*, 113 Nev. 805, 813, 942 P.2d 145, 150 (1997) (concluding that a declaration under NRS 53.045 met the affidavit requirement of the breathalyzer statute, even though the statute's language required an affidavit). To hold otherwise would make NRS 53.045 meaningless because it would require every statute imposing an affidavit requirement to state when a declaration may be used instead of an affidavit. Interpreting the two statutes so as to give meaning to both, we conclude that a declaration that complies with NRS 53.045 can fulfill NRS 41A.071's affidavit requirement.

Because the district court properly refused dismissal, we deny the petition for extraordinary writ relief.

HARDESTY and DOUGLAS, JJ., concur.

FELICIA GARCIA RAMIREZ, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 46417

July 1, 2010 235 P.3d 619

Appeal from a judgment of conviction, upon a jury verdict, of second-degree felony murder by means of child abuse, neglect, or endangerment. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

The supreme court, PARRAGUIRRE, C.J., held that failure to instruct jury that there was required to be immediate and direct causal connection between defendant's unlawful act or acts and victim's death in murder prosecution affected her substantial rights.

Reversed and remanded.

Karla K. Butko, Verdi, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Joseph R. Plater*, Deputy District Attorney, Washoe County, for Respondent.

1. HOMICIDE.
   Failure to instruct jury that there was required to be immediate and direct causal connection between defendant's unlawful act or acts and victim's death was improper in murder prosecution. NRS 177.255, 178.602, 200.030(2), 200.070, 200.508, 200.508(1), 200.508(2), 200.508(4)(a)-(c).
2. HOMICIDE.
   Under felony-murder rule, question of whether a felony is inherently dangerous, where death or injury is a directly foreseeable consequence of the illegal act, is a question for the jury to determine under the facts and circumstances of each case.
3. CRIMINAL LAW.
   An error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice.
4. CRIMINAL LAW.
   Failure to instruct jury that there was required to be immediate and direct causal connection between defendant's unlawful act or acts and victim's death in murder prosecution affected her substantial rights; State failed to specify felony under which it sought second-degree felony-murder conviction and, thus, she could have been convicted of second-degree felony murder under potentially invalid predicate offense, and there was conflicting evidence as to whether defendant or codefendant inflicted victim's mortal wounds. NRS 177.255, 178.602, 200.030(2), 200.070, 200.508, 200.508(1), 200.508(2), 200.508(4)(a)-(c).

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, C.J.:

In this appeal, we consider whether the jury was properly instructed on the offense of second-degree felony murder by means of child neglect or endangerment. For the reasons outlined in this opinion, we conclude that the jury was not completely and accurately instructed as to the necessary elements of second-degree felony murder and that the improper instruction affected appellant Felicia Ramirez's substantial rights. Accordingly, we reverse the district court's judgment of conviction and remand this matter for a new trial.[1]

FACTS AND PROCEDURAL BACKGROUND

Appellant Felicia Ramirez and her boyfriend, Joel Aponte, were each charged with alternative counts of first-degree felony murder by means of child abuse and second-degree felony murder by means of child neglect or endangerment based on the death of their 16-day-old daughter, Trinity. Ramirez and Aponte had two children together, another daughter and newborn Trinity.

At trial, expert testimony established that Trinity's death was the result of about 12 blows to the head with a blunt object no more than 12 hours before she was declared dead. She also had two small fractures to the back left ribs. Evidence at trial established that the child had been exclusively in the care of Aponte and Ramirez during that 12-hour time frame, and a pediatrician testified that Trinity was in good health a few days before her death. Aponte and Ramirez were arrested and charged approximately nine months after Trinity's death.

Shortly before their trial, Aponte reached a plea agreement with the State. He agreed to plead guilty to child neglect or endangerment resulting in substantial bodily injury or death in exchange for testifying against Ramirez. At trial, Aponte testified that when he returned home around 5 or 5:30 p.m. on the evening that Trinity

---

[1]In addition to the specific challenges addressed in this opinion, Ramirez contends that her conviction should be reversed on the grounds that (1) her Confrontation Clause rights were violated; (2) the district court erred by admitting prior bad act evidence; (3) the State failed to disclose evidence that was to be used at trial; (4) certain taped telephone conversations should not have been admitted based on hearsay grounds; and (5) the jury should have been provided instructions regarding malice, accomplice testimony, and the lesser included offense of felony child neglect or endangerment causing substantial bodily harm. Separately, Ramirez argues that because she never explicitly waived her right to jury sentencing, her sentence should be vacated and remanded.

We do not address Ramirez's remaining challenges because of our decision to reverse her conviction on the basis set forth in this opinion.

died, Trinity was pale and lethargic, but he saw no other signs of distress. Ramirez asked him to check on Trinity several times that night when she thought she heard Trinity crying. When he checked on Trinity around 9 or 9:30 p.m., she was not breathing.

He also testified to two incidents indicating that Ramirez was violent, suicidal, and did not want any more children. According to Aponte, when Ramirez was pregnant with Trinity, she arrived at his house drunk, began yelling that she did not want to live anymore or deal with another child, threatened to kill herself and their children, hit herself in the stomach, threw herself against a set of concrete stairs, and lay in the street saying she would let the cars run over her. He further testified that on another occasion after Trinity's birth, Ramirez responded to Aponte's decision to leave her by yelling, throwing things, and saying that she did not want to be a mother or to live anymore.

Ramirez testified that she was home alone with Trinity from 10 a.m. to 5 p.m. on the day Trinity died and that Trinity had been fussy, irritated, and a little sick with a cold. When Aponte arrived home at 5 p.m., Trinity was asleep on the couch. According to Ramirez, she and Aponte watched a basketball game while Trinity slept on the couch and then, while Ramirez made popcorn, Aponte put Trinity to bed. Aponte then checked on Trinity a few times after that. Ramirez testified that she did not hurt Trinity and did not see Aponte hurt Trinity.

Ramirez also explained that she attempted suicide about eight months after Trinity's death because Aponte left her, Trinity was dead, and their other daughter had been taken by child services. Ramirez told the jury that she did not know she was pregnant with a third child at the time of the suicide attempt. She also explained that she was referring to Aponte leaving her, Trinity's death, and her other child being taken away by child services when she said that she was ''sorry for what [she] did,'' that she had ''failed as a mother and a girlfriend,'' and that ''[i]t's all my fault'' in her suicide note.

Ramirez testified about her relationship with Aponte and his interaction with their children. In particular, she testified that Aponte was physically and emotionally abusive to her and that he had not been very interested in raising their two children. While Aponte would help with the children sometimes when asked, he was resistant and would get frustrated quickly, calling Trinity names when she cried. Ramirez testified that Aponte would say, ''that bitch cries too much'' and instruct Ramirez to ''shut the bitch up.''

Two witnesses testified about Aponte's and Ramirez's demeanor on the night of Trinity's death. The first paramedic responding to Ramirez's 9-1-1 call testified that Aponte was hysterical but that Ramirez did not cry. Similarly, the coroner's investigator who

picked up Trinity's body at the hospital testified that Aponte was crying but Ramirez was not.

The jury acquitted Ramirez of first-degree felony murder by means of child abuse but found her guilty of second-degree felony murder by means of child neglect or endangerment. The district court subsequently sentenced Ramirez to a term of life imprisonment with the possibility of parole after ten years. This appeal followed.

DISCUSSION

The jury was not completely and accurately instructed on the offense of second-degree felony murder by means of child neglect or endangerment

Although she failed to object at trial, Ramirez now contends that the jury was not completely and accurately instructed on the necessary elements of second-degree felony murder by means of child neglect or endangerment. We agree that the jury was not properly instructed as to all the necessary elements of second-degree felony murder. And because we conclude that the error affected Ramirez's substantial rights, we reverse the judgment of conviction and remand for a new trial despite Ramirez's failure to object to the instruction below.

The offense of second-degree felony murder

We first recognized the substantive offense of second-degree felony murder in *Sheriff v. Morris*, 99 Nev. 109, 659 P.2d 852 (1983). In *Morris*, we concluded that Nevada's involuntary manslaughter statute, NRS 200.070, when read in conjunction with Nevada's murder statute, NRS 200.030(2), permitted the offense of second-degree murder under the felony-murder rule. *See id.* at 113, 117-18, 659 P.2d at 856, 858-59.

This court, however, was mindful ''of the potential for untoward prosecution resulting from th[at] decision.'' *Id.* at 118, 659 P.2d at 859. As a result, we specifically limited application of the second-degree felony-murder rule to the ''narrow confines of this case wherein we perceive an immediate and direct causal relationship between the actions of the defendant, if proved, and the [victim's] demise.'' *Id.* We defined the term ''immediate'' to mean ''without the intervention of some other source or agency.'' *Id.* at 118-19, 659 P.2d at 859. We further limited the application of the rule to felonies that are inherently dangerous when viewed in the abstract. *Id.* at 118, 659 P.2d at 859. We recognized that ''[t]here can be no deterrent value in a second degree felony murder rule unless the felony is inherently dangerous since it is necessary that a potential felon foresees the possibility of death or injury resulting from the commission of the felony.'' *Id.*

Later, in *Labastida v. State*, we reaffirmed our narrow and limited holding in *Morris*, and succinctly stated that the second-degree felony-murder rule only applies when the following two elements are satisfied: (1) ''where the [predicate] felony is inherently dangerous, where death or injury is a directly foreseeable consequence of the illegal act,'' and (2) ''where there is an immediate and direct causal relationship—without the intervention of some other source or agency—between the actions of the defendant and the victim's death.'' 115 Nev. 298, 307, 986 P.2d 443, 448-49 (1999) (citing *Morris*, 99 Nev. at 118, 659 P.2d at 859). Because we have repeatedly expressed disapproval at the potential for untoward prosecutions resulting from our decision to recognize the second-degree felony-murder rule and consciously limited application of the rule, these two elements are critical to any second-degree felony-murder jury instruction.

The jury was not properly instructed on the immediate-and-direct-causal-relationship element

[Headnote 1]

The district court instructed the jury that the State must prove the following four elements to support a conviction for second-degree felony murder: (1) Ramirez ''did willfully and unlawfully'' (2) ''permit or allow'' Trinity (3) ''to suffer unjustifiable physical pain as a result of neglect or endangerment,'' and (4) Trinity ''died as a foreseeable consequence of the neglect or endangerment.''

[Headnote 2]

By instructing the jury that the State must prove that Trinity ''died as a foreseeable consequence of the neglect or endangerment,'' the jury was properly instructed on the inherently dangerous element.[2] *See, e.g.*, *Labastida*, 115 Nev. at 307, 986 P.2d at 448-49. However, in reviewing the instruction, it is clear that the

[2]The question of whether a felony is inherently dangerous, where death or injury is a directly foreseeable consequence of the illegal act, is a question for the jury to determine under the facts and circumstances of each case. Although our caselaw suggests that we look to whether a felony is inherently dangerous in the abstract, *see, e.g.*, *Morris*, 99 Nev. at 118, 659 P.2d at 859; *Noonan v. State*, 115 Nev. 184, 189, 980 P.2d 637, 640 (1999); *Labastida*, 115 Nev. at 307, 986 P.2d at 448, in practice this question has consistently been analyzed by looking to the manner in which the felony was committed. *See Morris*, 99 Nev. at 118, 659 P.2d at 859 (stating that under the facts of the case, the unauthorized sale of a controlled substance was inherently dangerous); *Noonan*, 115 Nev. at 189, 980 P.2d at 640 (concluding that ''leaving a sixteen-month-old child alone in a bathtub for twenty-five to thirty minutes [was] inherently dangerous''). Therefore, in reconciling these conflicting approaches, we abandon any suggestion that we should look at the felony in the abstract to determine whether it is inherently dangerous in favor of our practice of looking to the

jury was not instructed that there must be an immediate and direct causal connection between Ramirez's unlawful act or acts and Trinity's death. Therefore, we conclude that Ramirez was not provided a complete and accurate instruction on the offense of second-degree felony murder.

The incomplete instruction affected Ramirez's substantial rights

[Headnotes 3, 4]

Even though the jury was not instructed on the necessary elements for the crime of second-degree felony murder, because Ramirez did not object to the incomplete and inaccurate instruction at trial, reversal is only required if the error is plain from a review of the record and affected Ramirez's substantial rights. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); NRS 178.602; *see also* NRS 177.255. ''Under th[is] standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice.'' *Valdez*, 124 Nev. at 1190, 196 P.3d at 477 (internal quotations omitted).

While the failure to provide the specific elements of second-degree felony murder under *Morris* and *Labastida*, standing alone, might not amount to plain error, we conclude that Ramirez's substantial rights were affected by the improper instruction because (1) the State failed to specify the felony under which it sought a second-degree felony-murder conviction and, thus, Ramirez could have been convicted of second-degree felony murder under a potentially invalid predicate offense; and (2) there was conflicting evidence as to whether Ramirez or Aponte inflicted Trinity's mortal wounds.

The State failed to specify the predicate felony to support a second-degree felony-murder conviction

Nevada's felony offense of child neglect and endangerment, NRS 200.508, provides that a person can be held criminally liable for both willful and passive neglect or endangerment. Under NRS 200.508, a person is guilty of neglect or endangerment if he or she either (1) ''*willfully causes* a child . . . to suffer unjustifiable

---

manner in which the felony was committed, which happens to be the preferred approach. *See, e.g.*, 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.5(b), at 447-48 (2d ed. 2003); *State v. Stewart*, 663 A.2d 912, 919 (R.I. 1995) (''[T]he better approach [rather than viewing the elements of the felony in the abstract] is for the trier of fact to consider the facts and circumstances of the particular case to determine if such felony was inherently dangerous in the manner and the circumstances in which it was committed.'').

physical pain or mental suffering as a result of . . . neglect[3] or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of . . . neglect,'' or (2) ''is responsible for the safety or welfare of a child and . . . *permits*[4] or *allows*[5] that child to suffer unjustifiable physical pain or mental suffering as a result of . . . neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as a result of the . . . neglect.'' NRS 200.508(1) and (2) (emphases added).

Whereas NRS 200.508(1) addresses scenarios where the person charged under the statute directly committed the harm, NRS 200.508(2), by contrast, addresses situations where a person who is responsible for the safety and welfare of a child fails to take action to protect that child from the abuse or neglect of another person or source. NRS 200.508(2) does not require that the person directly inflict the harm to be found guilty of child abuse or neglect. As a result, in many instances, NRS 200.508(2) cannot serve as a predicate felony to second-degree felony murder. *Cf. Labastida*, 115 Nev. at 307, 986 P.2d at 449 (concluding that Labastida's commission of child neglect under NRS 200.508(2) could not support her second-degree murder conviction because her husband was the person who committed the harm).

Here, the State charged Ramirez with second-degree felony murder under NRS 200.508 generally, without distinguishing between subsections 1 and 2. Further confusing the matter, the State charged that Ramirez did ''willfully and unlawfully . . . permit or allow [Trinity] to suffer unjustifiable physical pain as a result of abuse or neglect,'' including the ''willful'' language from NRS 200.508(1), and the passive ''permit'' or ''allow'' language from NRS 200.508(2).

Because the State's charging document and the instruction submitted to the jury contained language from both NRS 200.508(1) and NRS 200.508(2), the jury was not specifically instructed as to the predicate felony under which the State's theory rested. This is particularly important considering that Ramirez could not be found guilty of second-degree felony murder under NRS 200.508(2) in

---

[3]''[N]eglect'' is defined as ''physical or mental injury of a nonaccidental nature, sexual abuse, sexual exploitation, negligent treatment or maltreatment of a child . . . under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.'' NRS 200.508(4)(a).

[4]''Permit means permission that a reasonable person would not grant and which amounts to a neglect of responsibility attending the care, custody and control of a minor child.'' NRS 200.508(4)(c) (internal quotations omitted).

[5]''Allow means to do nothing to prevent or stop the . . . neglect of a child in circumstances where the person knows or has reason to know that the child is . . . neglected.'' NRS 200.508(4)(b) (internal quotations omitted).

the event that the jury believed that Aponte actually killed Trinity. *See Labastida*, 115 Nev. at 307, 986 P.2d at 448-49 (noting that there must be ''an immediate and direct causal relationship—without the intervention of some other source or agency—between the actions of the defendant and the victim's death'').

There was conflicting evidence as to whether Ramirez or Aponte inflicted Trinity's mortal wounds

Given the conflicting evidence in this case, which indicated that either Ramirez or Aponte could have inflicted Trinity's mortal wounds, the causal element of second-degree felony murder was critically important. Although there was evidence that Ramirez could have caused Trinity's death (Aponte testified that Ramirez had threatened to kill herself and her children; doctors testified that Ramirez did not show any emotion the night Trinity died; Trinity was in Ramirez's exclusive custody and control for the majority of the time frame during which the mortal injuries were inflicted; Ramirez did not see Aponte hit Trinity; and Ramirez attempted suicide several months after Trinity's death, leaving a suicide note apologizing ''for what [she] did''), there was also evidence to the contrary (Aponte cared for Trinity immediately before her death; Ramirez testified that Trinity made an unusual cry when Aponte was attending to her; and Aponte would get frustrated with the baby and call the baby names). Because of this conflicting evidence, we cannot be certain that the jury determined that Ramirez was the immediate and direct cause of Trinity's death.[6]

As a result of these two considerations, we conclude that the improper jury instruction was prejudicial and affected Ramirez's substantial rights. Accordingly, we reverse the district court's judgment of conviction and remand this matter for a new trial.[7]

HARDESTY, DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

---

[6]The importance of the immediate-and-direct-causal-relationship element is further supported by the fact that the jury acquitted Ramirez of first-degree felony murder by means of child abuse.

[7]While we agree that Ramirez's conviction should be reversed and remanded for the reasons expressed above, we do not agree with Ramirez's contention that her conviction should be reversed for insufficient evidence.